1992

Robert Berrett v. Denver and Rio Grande Western Railroad : Petition for Writ of Certiorari

Utah Supreme Court

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Michael F. Richman; Eric C. Olson; David L. Arrington; Van Cott, Bagley, Cornwall and McCarthy; Attorneys for Petitioner.

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BRIEF

IN THE UTAH SUPREME COURT

ROBERT BERRETT, et al., Plaintiffs/Respondents, vs. DENVER & RIO GRANDE WESTERN RAILROAD, Defendant/Petitioner.	Supreme Court No. 920223 Court of Appeals No. 910215-CA Priority No. 16

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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PETITION FOR REVIEW FROM A DECISION AND JUDGMENT
OF THE UTAH COURT OF APPEALS

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Tab 1

IN THE UTAH COURT OF APPEALS

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Robert Berrett, Gerald Argyle, et al., Plaintiffs and Appellants, v. Denver and Rio Grande Western Railroad Company, Inc., Defendant and Appellee.	OPINION (For Publication) Case No. 910215-CA F I L E D (April 3, 1992)

Fourth District, Utah County
The Honorable Cullen Y. Christensen

Attorneys: Allen K. Young and Randy S. Kester, Springville, for Appellant
Michael F. Richman and Eric C. Olson, Salt Lake City, for Appellee

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Before Judges Bench, Garff, and Jackson.

BENCH, Presiding Judge:

Plaintiffs brought suit against defendant for damages suffered as a result of a landslide in Utah County. Defendant prevailed at trial. Plaintiffs appeal the trial court's decision to preclude one of their expert witnesses from testifying. We reverse and remand for a new trial.

BACKGROUND

On April 13, 1983, a massive landslide began to move down the hillside in Spanish Fork Canyon, just downriver of the small town of Thistle. The slide progressed into the canyon and blocked the Spanish Fork River. A small lake formed that inundated and destroyed Thistle. The lake was approximately one hundred feet deep and remained for approximately six months until the slide was breached and the water receded. The town was

thereafter designated a flood plain, and no one has been allowed to rebuild. Plaintiffs are the former inhabitants of Thistle.

Plaintiffs claim that the landslide was caused by defendant's construction activities at the toe of the slide. In the late 1800s, a predecessor railroad made a cut near the toe of the slide in order to run its tracks up the canyon. Defendant subsequently made a second cut in the early 1900s and a final cut in 1951. Plaintiffs estimate that the total soil removed by these cuts amounted to between 10,000 and 15,000 cubic yards. In essence, plaintiffs claim that but for the cuts made at the toe of the slide, the slide would not have occurred, or at least it would not have been as massive, and their homes would not have been destroyed.

Defendant, on the other hand, asserts that inasmuch as the slide began at the top and moved downward, the landslide would have occurred even if the soil had not been removed from the toe. Defendant therefore claims that its actions were not the cause of the slide.

Plaintiffs commenced this action against defendant in March of 1986. Trial was initially set for August 10, 1987, but was continued and set for February 21, 1989. Another continuance set trial for August 14, 1989. On June 27, 1989, the trial court conducted a pre-trial hearing. Defendant complained that plaintiffs had not provided defendant with their final witness list in response to its interrogatory.[1] The trial court warned plaintiffs about their failure to disclose their witnesses, but did not set a deadline for the final disclosure of witnesses. At the suggestion of defense counsel, the trial court instructed the parties to submit a scheduling order and a pre-trial order within ten days. No scheduling order was submitted, nor do we have any record that one was ever discussed by the parties. No pre-trial order was ever submitted because the parties could not agree on its content.

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1. The record is replete with accusations from both parties of dilatory action by the other side. Suffice it to say that this has been a strongly contested lawsuit and this court need not assess blame for the delays. We do note, however, that part of the delay, as indicated by the trial court, was due to defendant's failure to respond fully to plaintiffs' interrogatories regarding any other slide-related lawsuits against defendant. At the June 27th hearing, plaintiffs were still seeking copies of depositions from defendant regarding a separate slide-related lawsuit.

Defendant's counsel indicated to plaintiffs' counsel in a letter dated July 12, 1989, that defendant expected plaintiffs' final witness list no later than August 1st. Counsel for defendant also sent a proposed pre-trial order to plaintiffs' counsel. The proposed order indicated that the names of all witnesses to be called at trial, not already listed in the proposed pre-trial order, be delivered to opposing counsel and filed with the trial court at least ten days prior to trial.

On July 18th and 19th, following the June 27th hearing, plaintiffs' counsel met with one of their expert witnesses, Dr. Olson, and reviewed reports written about the Thistle slide area. Plaintiffs' counsel agreed with Dr. Olson at that time to attempt to locate one of the authors, Dr. John F. Shroder, a geomorphologist and a recognized expert on the Thistle slide area.[2] Plaintiffs' counsel contacted Dr. Shroder by telephone and concluded that his testimony would be beneficial to plaintiffs' case.

On August 1, 1989, plaintiffs provided defendant with their final witness list. Dr. Shroder was included on the list along with six other possible witnesses named for the first time. On August 3, 1989, defendant moved to exclude the new witnesses, including Dr. Shroder. The trial court ordered the exclusion of the testimony of Dr. Shroder and any other witnesses not disclosed on or before July 11, 1989.

The plaintiffs' claim was tried to a jury from August 14th through August 29th of 1989. At the conclusion of trial, the jury rendered a special verdict in favor of defendant. The trial court entered judgment in favor of defendant, dismissing all claims with prejudice. Plaintiffs unsuccessfully moved for a new trial. They now raise several issues on appeal, including whether the trial court abused its discretion in excluding the testimony of expert witness Dr. Shroder. Inasmuch as our resolution of this issue demands a new trial, we do not reach the remaining allegations of error at trial.

STANDARD OF REVIEW

Trial courts have broad discretion in managing the cases assigned to their courts. See generally Utah R. Civ. P. 16. We will not interfere with a trial court's case management unless its actions amount to an abuse of discretion. See Dugan v. Jones, 615 P.2d 1239, 1244 (Utah 1980). Excluding a witness from

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2. Dr. Shroder prepared his doctoral thesis on the Thistle slide area and published an article discussing the area in 1967.

testifying is, however, "extreme in nature and . . . should be employed only with caution and restraint." Plonkey v. Superior, 106 Ariz. 310, 475 P.2d 492, 494 (1970). See also Nickey v. Brown, 7 Ohio App. 3d 32, 454 N.E.2d 177 (1982) (exclusion is severe sanction which should be invoked only to enforce willful noncompliance).

If a trial court erroneously excludes a witness, we will reverse if the error was prejudicial to the substantial rights of a party. See generally Utah R. Civ. P. 61.

> It is not always easy to tell when an error should be regarded as prejudicial . . . . [If] the error appears to be of such a nature that it can be said with assurance that it was of no material consequence in its effect upon the trial because reasonable minds would have arrived at the same result, regardless of such error, it would be harmless and the granting of a new trial would not be warranted. On the other hand, if it appears to be of sufficient moment that there is a reasonable likelihood that in the absence of such error a different result would have eventuated, the error should be regarded as prejudicial and relief should be granted. Measured by such considerations we assay the possible effect of the error complained of, realizing of course that it is now quite impossible to tell definitely whether the verdict would have been different.
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> . . . .
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> [If] we cannot, with any degree of assurance, affirm that the use of such evidence would not have been helpful to the plaintiff, the doubt should be resolved in favor of allowing him to have a full and fair presentation of his cause to the jury.

Joseph v. W.H. Groves Latter-day Saints Hosp., 7 Utah 2d 39, 44, 318 P.2d 330, 333 (1957).[3] See also Morton Int'l, Inc. v. State Tax Comm'n, 814 P.2d 581, 584 (Utah 1991) "an error will be harmless if it is 'sufficiently inconsequential that there is no reasonable likelihood that the error affected the outcome of the proceedings'" (quoting State v. Verde, 770 P.2d 116, 120 (Utah 1989)) empnasis added)).

ANALYSIS

Timeliness of Disclosure

Plaintiffs contend that inasmuch as there was no court order mandating disclosure by a certain date, they acted reasonably in relying on representations from defendant that August 1, 1989, was an acceptable date for submitting the final witness list. In

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3. Contrary to the implication of the dissent in footnote two, the supreme court did not alter this standard when the same case was appealed a second time in Joseph v. W.H. Groves Latter-day Saints Hosp., 10 Utah 2d 94, 100, 348 P.2d 935, 938 (1960). The case was initially remanded for a new trial with instructions to allow the excluded evidence. The jury again found in favor of the defendants. A totally new issue was then raised in the second appeal, i.e., whether the trial court erred in not giving a jury an instruction on the theory of res ipsa loquitur. The supreme court concluded that the requested instruction was properly denied and that no error was made. Prejudice, therefore, was not even at issue in the second opinion. The supreme court nevertheless stated the following dicta which immediately precedes the dicta quoted by the dissent.

> What the parties are entitled to . . . is an opportunity for one claiming a grievance . . . to present it to a court or jury and to have a fair trial. When this is done, and the verdict and judgment are entered, all presumptions are in favor of validity.

Id.

In the first Joseph appeal, the supreme court held that the plaintiff did not have a fair opportunity to present his case because of the improper exclusion of the evidence. There was not, therefore, any presumption of validity and any doubt was to be resolved in favor of the appellant. In the second case, the evidence was admitted, thereby creating the presumption of validity. The language quoted in the text, despite its age, remains good law as to when we will presume the validity of the judgment so as to apply the standard relied upon by the dissent.

particular, plaintiffs rely upon the July 12th letter referring to August 1st as the date defendant expected plaintiffs' final witness list. Plaintiffs also assert that their disclosure was reasonable inasmuch as it would have been timely under the proposed pre-trial order prepared by defendant's counsel indicating that new witnesses should be disclosed no later than ten days before trial.

Defendant, on the other hand, contends that despite any representations it may have made, plaintiffs were bound by a deadline set by the trial court. Cf. Christenson v. Jewkes, 761 P.2d 1375, 1377 (Utah 1988) (trial court had discretion to deny motion to continue trial despite parties' separate agreement to continue). According to defendant, the trial court set a deadline for the disclosure of witnesses when it indicated at the June 27th hearing that a pre-trial order was to be prepared within ten days. The trial court itself indicated at the August 3rd hearing on defendant's motion to exclude Dr. Shroder's testimony that it "expected" the witnesses to be listed in the pre-trial order.

A trial court's power to sanction a party for failure to cooperate in discovery comes from rule 37(b)(2) of the Utah Rules of Civil Procedure, which provides that if a party fails to obey an order entered under rule 26(f), the court may prohibit the offending party from introducing designated matters into evidence. Rule 26(f) addresses discovery conferences and directs that following a discovery conference the trial court shall enter an order "establishing a plan and schedule for discovery." As has been recognized by other states,[4] the necessary prerequisite to the imposition of a sanction is an order that "brings the offender squarely within possible contempt of court." Sexton v.

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4. See Clarke v. Sanders, 363 So.2d 843 (Fla. Dist. Ct. App. 1978) (there was no pretrial order requiring the parties to list witnesses on a pretrial statement); Henderson v. Illinois Cent. Gulf R.R. Co., 114 Ill. App. 3d 754, 449 N.E.2d 942 (1983) (a violation is a condition precedent to the imposition of a sanction); Lindley v. St. Mary's Hosp., 85 Ill. App. 3d 559, 406 N.E.2d 952 (1980) (no order of court or rule of discovery was contravened); Fruehauf Trailer Div. v. Thornton, 174 Ind. App. 1, 366 N.E.2d 21 (1977) (no entry of the pre-trial order was made in the record before the issue of the disputed expert arose); McHenry v. Hanover Ins. Co., 246 So.2d 374, 377 (La. Ct. App. 1970) (no formal pre-trial order was entered); Inner City Wrecking Co. v. Bilsky, 51 Ohio App. 2d 220, 367 N.E.2d 1214 (1977) (before a party may be sanctioned, party must be in default of an order rendered by the trial court which was properly announced and formally entered).

Sugar Creek Packing Co., 38 Ohio App. 2d 32, 311 N.E.2d 535, 538 (1973) (absent an order, a party may believe that the court has no objection to the information as supplied). See also Whitehead v. American Motors Sales Corp., 801 P.2d 920, 925-26 (Utah 1990) (improper to sanction defendant for not producing test films which did not fall within express terms of order). Cf. 8 Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure, Chap. 6 Sanctions § 2289 (Supp. 1991) (federal rule 37(b)(2) applies "only if there has already been an order").

Contrary to defendant's assertion and the trial court's belief, a review of the record reveals that the trial court did not set a deadline for witness disclosure at the June 27th hearing. While the disclosure of witnesses was discussed at the hearing, no motion was before the trial court and no order was made establishing a deadline. The trial court itself indicated:

> [T]here's nothing before the court except some generalities that you talked about. . . . I don't know what else to do with you, counsel, except to direct you to the Rules of Civil Procedure and have you follow it in writing, and that's about all I can do. Simply make your motions, I'll rule on them as they are presented. I have nothing before me today to consider.

Given the trial court's express declaration that it was not acting upon any motion at the hearing, the fact that the court may have had an unexpressed expectation that the pre-trial order would contain the final witness list simply did not impose a clear and affirmative deadline on plaintiffs' counsel.

Defendant's counsel even conceded at the hearing that it had not sought the hearing "to get the court to render any orders." He simply was seeking to "make this a kind of status conference so the court knows where things are going." The trial court then admonished the parties to attempt to work things out:

> And if you can't, all I can suggest to you, you've got the rules of civil procedure, and we'll have to play by the book and let the chips fall where they may. I hate to see that. Lots of times we can accomplish a great deal more by cooperation than otherwise. But when that fails then we have a rule to fall back on . . . .

> So I'm going to direct that whatever motions you are going to file that, either to compel or any purpose, that we ought to have those filed no later than ten days from today.

The parties failed to present either a scheduling order or a pre-trial order at the end of the ten-day period. Defendant neither filed a motion to compel plaintiffs to disclose their final witness list, nor did the trial court enter any order establishing any deadlines for the final disclosure of witnesses pursuant to the discretion granted to it under rule 26(f).

The actions of defendant's own counsel belie a claim that a deadline was set at the June 27th hearing. Defendant's counsel sent a letter on July 12th indicating an August 1st deadline for the final disclosure of witnesses. The proposed pre-trial order prepared by defendant's counsel, while never agreed to by the parties, also provides insight into counsel's understanding of the trial court's instructions at the hearing. The proposed order indicated that if plaintiffs desired to add new witnesses not already listed in the proposed order, then those witnesses could be disclosed up until ten days prior to the trial. Defendant's counsel now seeks to repudiate these representations by simply saying that he did not mean them. Such a repudiation, however, is patently unfair to plaintiffs who relied upon those representations and would be prejudiced by their withdrawal. Defendant, therefore, may not now claim that it had not agreed to an August 1st deadline, nor may it assert that it was prejudiced or surprised by the timely disclosure on August 1st. See Jansen v. Lichwa, 13 Ariz. App. 168, 474 P.2d 1020 (1970) (sanction was improper when complaining party consented to continuing discovery until trial); cf. Whitehead, 801 P.2d at 925-26 (it was improper to exclude test of Jeep CJ-5 for defendant's purported failure to comply with discovery order when discovery order only required disclosure of tests of Jeep Commandos); Pratt v. Stein, 298 Pa. Super. 92, 444 A.2d 674 (1982) (defendant could not complain of prejudice when it requested an expert witness list only 23 days before trial).

Defendant also claims that plaintiffs may not challenge the trial court's preclusion of Dr. Shroder's testimony because they never adequately proffered Dr. Shroder's testimony under rule 103(a)(2) of the Utah Rules of Evidence. The preclusion of Dr. Shroder's testimony, however, was not an evidentiary ruling to which rule 103 would apply; it was a case management decision under the rules of civil procedure. It is clear from the record that the substance of the testimony had no bearing upon the trial court's decision. Therefore, any proffer of the substance of Dr. Shroder's testimony would have neither benefitted the trial court

nor caused it to "correct" its decision which is the purpose of evidentiary rule 103(1)(2).[5] The failure to proffer therefore does not preclude an appeal of a case management decision.[6]

We hold that absent an order creating a judicially imposed deadline,[7] a trial court may not sanction a party by excluding its witnesses under rule 37(b)(2). See Inner City Wrecking Co. v. Bilsky, 51 Ohio App. 2d 220, 367 N.E.2d 1214, 1218 (1983) (without an order compelling compliance with court rules, the sanction imposed by trial court was beyond its authority). The

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5. The dissent asserts that no new trial should be ordered because plaintiffs did not object to the exclusion of Dr. Shroder until after the trial. The record, however, clearly indicates that the plaintiffs objected at the August 3rd hearing. The dissent also implies, without any supporting authority, that before trial plaintiffs should have sought a writ of mandamus ordering the trial court to permit Dr. Shroder to testify. Sound judicial policy dictates that we not increase the burden on our already over-burdened system by requiring collateral attacks during a pending case in order to preserve issues for appeal.

6. The dissent asserts that plaintiffs could have, and should have, used Dr. Shroder as a rebuttal witness. The trial court ruled: "I'm not going to permit you to offer the testimony or bring out any witnesses that were not designated or known by the [sic] July the 11th, 1989." (Emphasis added.) Counsel for plaintiffs claims that he understood this to be an absolute bar to using Dr. Shroder, either in the case in chief or in rebuttal. Given the absolute language used, this was a reasonable interpretation. Contrary to the dissent's representation, the trial court never indicated otherwise. The language relied upon by the dissent in footnote three, which it argues left open the possibility of "the testimony" being used in rebuttal, was actually spoken in reference to 73 depositions plaintiffs had requested permission to use. The trial court told plaintiffs they could only use specific passages of the 73 depositions, but that any portion of the depositions could be used in rebuttal if needed to challenge the veracity of any witness. Given the absolute language used by the trial court, we do not fault the plaintiffs for not attempting to use Dr. Shroder in rebuttal.

7. The Utah Supreme Court has previously acknowledged that a written order is not statutorily required. Dugan v. Jones, 615 P.2d 1239, 1244 (Utah 1980). In this case, however, we do not even have an oral order from the bench. We add our voice to that of the supreme court in encouraging the entry of written orders so as to reduce the type of confusion that has arisen in this case. Id.

dissent faults us for only considering the trial court's ruling under rule 37(b)(2). It asserts that the trial court may have excluded Dr. Shroder because plaintiffs proceeded in bad faith. Not only does such a speculative conclusion ignore the fact that there was no evidence that the plaintiffs acted in bad faith,[8] it misses the thrust of this opinion which is that absent an express order of the trial court setting a specific deadline for the disclosure of the final witness list, plaintiffs did not act in bad faith.

No order was entered at the June 27th hearing, nor do we have any indication that any such order was ever entered relating to the August 14th trial date.[9] Defendant even conceded that there was no scheduling order in place when it moved to exclude Dr. Shroder's testimony. By exceeding its procedural authority granted by the rules, the trial court abused its discretion. Tolman v. Salt Lake County Attorney, 818 P.2d 23, 27 (Utah App. 1991) (stepping outside the arena of discretion is an abuse of discretion).

Prejudice

As to whether the erroneous exclusion of Dr. Shroder's testimony was harmless, we follow the reasoning of the supreme

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8. Plaintiffs' counsel told the trial court that he made the decision to call Dr. Shroder in mid-July. The trial court clearly believed plaintiffs' counsel should have made the decision earlier, but there is no indication that the trial court believed the plaintiffs acted in bad faith. In fact, the example relied upon by the dissent as an indication of the plaintiffs' bad faith, i.e., the late request to use 73 depositions from another case, was caused by the defendant. The trial court itself expressly blamed defendant, not plaintiffs, for that delay.

9. There was a scheduling order entered prior to the February 10, 1989, trial date indicating that witness lists were to be exchanged on November 15, 1988. That date, however, was effectively rendered moot by the continuance of the February trial date to August 1989. The trial court indicated at the June 27th hearing that it had merely anticipated that the earlier schedule regarding the February trial date would be proportionately applied to the August trial date. Such an unexpressed assumption is simply insufficient to create a new and binding schedule. See Inner City Wrecking Co., 367 N.E.2d at 1218 (order must be properly announced and entered before sanctions may be imposed).

court in Joseph v. W.H. Groves Latter-day Saints Hospital, 818 P.2d at 994.

> Some indication of the importance of the error with which we are here concerned is to be found in the fact that counsel thought the matter of sufficient consequence that he objected to [the admission of the evidence]. It strikes the writer as being somewhat inconsistent that counsel now urges that depriving plaintiff of the use of such evidence was merely harmless error. If it is so plain that it would not have helped plaintiff's case, one is led to wonder why counsel made the objection and insisted that it not be used. The obvious answer seems to be that defendant's counsel was actually apprehensive that it may have a substantial effect against his client. Of course, he could not be sure, nor can we.
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> In view of the fact that there is such substantial doubt that we cannot, with any degree of assurance, affirm that the use of such evidence would not have been helpful to the plaintiff, the doubt should be resolved in favor of allowing him to have a full and fair presentation of his cause to the jury.

At the August 3rd pre-trial hearing, defendant strongly objected to allowing Dr. Shroder to testify at trial. At that time, defendant was aware of Dr. Shroder's article and his geomorphological credentials. Defendant also knew that Dr. Shroder was being offered as a witness to support plaintiffs' contentions that the defendant's actions at the toe of the slide contributed to the slide. At trial, defendant argued that its geomorphology experts were more credible than plaintiffs' geotechnical engineering experts. Dr. Shroder's testimony as a geomorphologist, which would have indicated that the slide was caused by defendant's cuts at the toe of the slide, would have directly contradicted defendant's geomorphologists' conclusion that the slide started at the top.

Given defendant's own emphasis on the type of experts presented, we cannot say that the geomorphological credentials and testimony of Dr. Shroder would not have been helpful to the plaintiffs' case in this battle of expert witnesses. In

accordance with the supreme court's direction in Joseph, we resolve the doubt in favor of the plaintiffs having an opportunity to fully and fairly present their case and find that the exclusion of Dr. Shroder's geomorphological testimony was prejudicial.[10]

CONCLUSION

Defendant agreed that plaintiffs could disclose their final witness list on August 1st and therefore may not claim prejudice when plaintiffs disclosed Dr. Shroder on August 1st. Inasmuch as the plaintiffs did not violate any court order compelling discovery of their expert witnesses, the trial court abused its discretion by excluding the testimony of Dr. Shroder. We cannot with any degree of assurance conclude that the improper exclusion of Dr. Shroder's testimony did not affect the outcome of the case.

The judgment of the trial court is therefore reversed and the case is remanded for a new trial.

Russell W. Bench,
Presiding Judge

I CONCUR:

Regnal W. Garff, Judge

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10. We note in response to the dissent that the difference in our views as to whether there is prejudice in this case appears to arise from the fact that the dissent relies upon cases where the disputed evidence was erroneously admitted, rather than excluded. When evidence is erroneously admitted, it is possible for a reviewing court to excise the offending evidence and evaluate the remaining uncontested evidence so as to determine whether the properly admitted evidence is such that the prevailing party would have prevailed anyway. Where evidence is excluded, however, it is difficult, if not impossible, to conclude on review that the missing evidence would not have made a difference to the jury. The jury has never had the opportunity to hear the excluded evidence and weigh it against that which is admitted. The presumption of validity relied upon by the dissent is therefore absent when evidence is erroneously excluded.

JACKSON, Judge, dissenting:

Because I do not think the plaintiffs have met their burden of establishing substantial prejudice, I respectfully dissent from the majority's decision to reverse and remand.

Even if I were persuaded that the trial court's action in excluding Dr. Shroder from testifying was an abuse of discretion,[1] the plaintiffs still must establish that there is a reasonable likelihood that the result at trial would have been different without his testimony. Batt v. State, 28 Utah 2d 417, 503 P.2d 855, 859 (Utah 1972); Bowden v. Denver & Rio Grande Western R.R., 3 Utah 2d 444, 286 P.2d 240, 244 (Utah 1955). "No error in either the admission or the exclusion of evidence . . . is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice." Utah R. Civ. P. 61. Absent any showing by plaintiffs that the outcome would have differed, every reasonable presumption as to the validity of the verdict below must be taken as true upon appeal. Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 301 (Utah 1982). The majority opinion ignores the language of Rule 61 and the cases which have interpreted that rule as placing the burden on the complaining party to establish substantial prejudice, and instead relies upon a 1957 case for the proposition that if we

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1. However, the majority's reliance upon Rule 37(b) of the Utah Rules of Civil Procedure in reaching this conclusion is misplaced. I agree with the majority that the trial court had not entered an order regarding discovery, and that therefore, no discovery order was violated. See Henderson v. Illinois Cent. Gulf R.R., 449 N.E.2d 942, 944 (Ill. 1983) (no order for discovery so court could not sanction for discovery violation). But the trial court did not cite Rule 37(b) as justification for excluding the Shroder testimony. The trial court stated that because plaintiffs admitted having known about the witnesses "a long time ago" and had failed to designate who they were, those witnesses would be excluded from testifying.

It is just as conceivable that the trial court decided to exclude the testimony because it felt plaintiffs had consistently proceeded in bad faith in preparing for trial. On August 1, fourteen days before the twelve-day trial was to commence, plaintiffs disclosed they intended to call an additional seventy-eight witnesses (through live testimony or deposition). The trial court excluded the testimony of only three of these witnesses. The trial court then ordered plaintiffs to designate what portions of the 75 depositions they intended to read, but did not exclude this testimony.

cannot decide that there was prejudice, we must reverse the decision of the trial court and order a new trial.[2]

On appeal, plaintiffs argue the jury was deprived of hearing relevant information because the trial court excluded Shroder's testimony. Plaintiffs further allege that Shroder should have, at a minimum, been allowed to testify as a rebuttal witness.[3] Plaintiffs' only mention of the prejudice suffered by them is the mere assertion that Shroder's testimony was "crucial to plaintiffs' case." Plaintiffs did not petition for an extraordinary writ and chose instead to take their chances and proceed to trial. They made no attempt to offer the Shroder testimony on rebuttal.[4] It was only after they lost at trial,

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2. Joseph v. W.H. Groves Latter-day Saints Hosp., 7 Utah 2d 39, 318 P.2d 330, 333 (1957), upon which the majority opinion relies, held that because the trial court allowed certain notes to be admitted into evidence, it should also have allowed counsel to "elabor[ate] for the benefit of those uninitiated in the mysteries of medical terminology." Instead, the trial court had sustained defendant's objection to allowing plaintiff to read and use the notes in his argument. The case was remanded for a new trial, and the jury again returned a verdict of no cause of action. Joseph v. W.H. Groves Latter-day Saints Hosp., 10 Utah 2d 94, 348 P.2d 935, 936 (1960). When the case was appealed for a second time, the supreme court stated firmly that "[t]he burden is upon the appellant not only to show that there was error, but that it was prejudicial to the extent that there is a reasonable likelihood that in its absence there would have been a different result." Id. at 938. This is the same burden which I recognize as being on plaintiffs in the instant case.

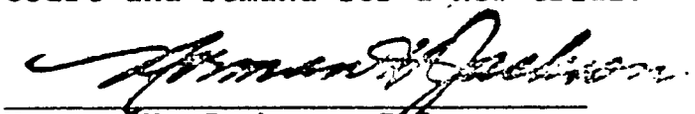
3. Plaintiffs offered no rebuttal witnesses at trial and the record does not support plaintiffs' contention that they were precluded from introducing Shroder as a rebuttal witness. The trial court in fact, at the August 3rd hearing, told counsel for plaintiffs that while the excluded evidence could not be used as part of the case-in-chief, the court was not foreclosing the possibility of using the testimony "to impeach or for some other purpose, if there is a dispute in testimony."

4. Plonkey, the Arizona case cited by the majority opinion involved facts much different than those before us. There, the plaintiff, whose witness had been excluded by the trial court for similar reasons, did petition for review of that decision before the trial commenced, utilizing a writ of mandamus. We do not suggest that had the plaintiffs petitioned the trial court for a similar writ, a new trial would then be appropriate. We simply point out that plaintiffs did not exhaust all remedies available

(continued...)

that plaintiff objected to the exclusion of the Shroder testimony.

Plaintiffs in this case have failed to provide this court with any basis for declaring that the trial court's exclusion of Shroder's testimony was prejudicial to the extent that without the exclusion, there is a reasonable likelihood that the outcome of the trial would have been different.[5] Because plaintiffs fail to meet this burden, their contention is without merit. See Ashton, 733 P.2d at 154. I would affirm the trial court, and thus dissent from the majority's decision to reverse the trial court and remand for a new trial.



Norman H. Jackson, Judge

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4. (...continued)
to them, nor did they attempt to introduce Shroder's testimony on rebuttal.

Further, the trial court's ruling in this case could not have been as unexpected as plaintiffs would have us believe. At a hearing on June 27, the trial court warned the parties that if they did not disclose their witnesses, it would make an order that they could not testify.

5. See Christenson v. Jewkes, 761 P.2d 1375, 1378 (Utah 1988) (Zimmermann, J. concurring) (any error by trial court in excluding evidence was not shown to have "sufficiently undermined the outcome"); Redevelopment Agency v. Jones, 743 P.2d 1233, 1235 (Utah 1987) (even if it is determined on appeal that a trial court erred, "we must also consider whether or not the error was prejudicial"); Ashton v. Ashton, 733 P.2d 147, 154 (Utah 1987) (appellant must establish "not only that an error occurred, but that it was substantial and prejudicial in that appellant was deprived in some manner of a full and fair consideration of the disputed issues by the jury"); Onyeabor v. Pro Roofing, Inc., 787 P.2d 525, 529 (Utah App. 1990) ("Even if we assume that the admission of [the expert's] testimony constituted error, plaintiff fails to demonstrate how he was prejudiced. Any error in the admission of evidence must be disregarded unless it substantially affects the substantial rights of the parties."); cf. Whitehead v. American Motors Sales Corp., 801 P.2d 920, 928 (Utah 1990) (cumulative effect of trial court's errors in excluding evidence substantially prejudiced defendants' rights); Kott v. City of Phoenix, 158 Ariz. 415, 763 P.2d 235 (1988) (trial court's decision to allow officer to testify who had been unidentified to other side before trial was reversible error since admission of evidence was erroneous and error not harmless).

Tab 2

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1989 JUN 28 [illegible]

DA

June 23, 1989

CV-86-616

Received
6-26-89
cyc jenkins

HAND-DELIVERED

Allen K. Young, Esq.
Randy S. Kester, Esq.
YOUNG & KESTER
101 East 200 South
Springville, Utah 84663

Re: Berrett v. D&RGW

Dear Allen & Randy:

This letter is written as a follow-up to my letters to you of May 12, 1989, June 2, 1989, and June 19, 1989, as well as our various telephone conversations in the interim. On May 1, 1989, Judge Christensen issued his Ruling on the Railroad's Motion to Dismiss. Under Local Rule 4-504(1), your firm, as counsel for the prevailing party, was to have prepared a proposed order within fifteen days of the Ruling. Today, fifty-three days later, I finally received a proposed Order mailed from your office on June 21, 1989. As a consequence, we are finally in a position to deliver the Railroad's Answer to Third Amended Complaint and the Railroad's Responses to Plaintiff's Interrogatories and Request for Production. Copies of these pleadings are enclosed herewith.

At the March 24, 1989 hearing, counsel represented to the Court that they would formulate a Scheduling Order based upon the time table set in the Scheduling Order for the February trial. On May 12, 1989, I forwarded to Randy a proposed form of Scheduling Order that incorporated the timing of the Court's previous Order. Thereafter, I heard nothing from either of you. I placed several calls to your office that were not returned. Finally, on June 1, 1989, Allen and I spoke. I agreed that the deadlines in the proposed Scheduling Order could be modified and invited him to provide me with any alternative dates that you might propose. I have yet to receive any proposed schedule.

In my May 12, 1989 letter, I requested that you advise me of dates on which we could complete the depositions of your experts, Dr. Olsen and Mr. Leonard. This request was repeated in my June 2, 1989 and June 19, 1989 letters as well as in separate conversations with each of you. Nevertheless, you still have not advised us of a date on which we can complete these depositions. As you know, the preparation of our experts is in large measure dependant on their review of what your experts are going to say. With the new issues in the case and Dr. Olsen's statement that he intends to perform a limit equilibrium analysis, it is essential that we complete the depositions to prepare our experts.

On the subject of depositions, we have directed our experts to hold open the last two weeks in July, 1989 for you to take or complete their depositions. Nevertheless, you have not yet advised us of whom you wish to depose and where and when you would like to depose them.

We have discussed the need for a pretrial order and witness lists. We especially need to know what witness you intend to call and what depositions you may read to the jury. In my June 2, 1989 letter, I requested that you provide us with a witness list by June 12, 1989. You indicated in conversation that you may call witnesses listed in the Utah Railway pretrial order in addition to those listed in earlier drafts of the pretrial order in this case. I advised you that I did not have a copy of the Utah Railway pretrial order and I understood that you would provide me with one. Nonetheless, when I received your letter of June 15, 1989 (posted June 21, 1989), a copy of the Utah Railway pretrial order was not included. Further, with reference to the concern expressed in that letter regarding our witness list, you will note that it is part of the draft pretrial order sent to you on June 19, 1989.

According to my calculations, we are just a little over seven weeks away from trial. For the past six weeks, our office has made every effort to complete our trial preparation. We have not received the slightest cooperation from you. You have ignored phone calls and only belatedly (and partially) responded to letters. You have only now after some prodding proposed an order memorializing Judge Christensen's May 1, 1989 Ruling. You have incorporated wholesale what I suspect is a long witness list from other litigation without providing us with a copy of that list and without specifying with whom you have talked and whom you might realistically call as a witness.

Because of the problems set forth above, we have secured a hearing with the Court on June 27, 1989 at 4:00 p.m. to discuss trial preparation. It is our firm intent to see this case to trial on August 14, 1989. Where we have been denied the opportunity of full and timely discovery by reason of your refusal to cooperate, we will ask the Court to exclude evidence and/or claims. In view of the complexity of this matter and the enormous investment of time that has been made to this point, we think it unfair to our clients, the Court and the jury to save the most critical factual investigation for a last minute rush that can only result in surprise and confusion.

Sincerely,

Eric C. Olson

ECO:
cc: Honorable Cullen J. Christensen

Tab 3

O R I G I N A L

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR UTAH COUNTY, STATE OF UTAH

- - -

ROBERT BERRETT, GERALD ARGYLE, et al., Plaintiffs, vs. DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, INC., Defendant.	Case No. CV-86-616 TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, that the above-entitled matter came on regularly for hearing before the Honorable Cullen Y. Christensen, Judge of the above-entitled Court, on the 27th day of June, 1989, commencing at the hour of 4:11 o'clock p.m., at Room 310, County Courthouse Building, 51 South University Avenue, Provo, Utah;

That there appeared as counsel representing plaintiffs, ALLEN K. YOUNG, ESQ., and as counsel representing defendant, MICHAEL F. RICHMAN, ESQ. and ERIC C. OLSON, ESQ.

WHEREUPON, the following proceedings were had:

Case No. CV-86-616, Berrett, et al, vs. Denver Rio Grande.

Mr. Young, you are here for the plaintiffs?

MR. YOUNG: Yes, your Honor.

THE COURT: Mr. Richman, what are we here for? I don't see anything in the file.

MR. RICHMAN: Well, your Honor, the reason we are here, Mr. Olson had hand-delivered to the Court last Friday a letter which he had sent to Mr. Young expressing some of the difficulties we have had with respect to getting this case prepared for trial. I don't know if the Court has had an opportunity to read that letter or not.

THE COURT: Yes, I've read it.

MR. RICHMAN: Okay. That's why we are here, your Honor. We want this trial to go forward on August 14, 1989. We do not want a continuance. This case is too expensive and too time-consuming. And it seems to us that it's time to stop the histrionics that have been going on in this case and time to actually get something done. And we have had tremendous difficulty with Mr. Young's office getting the information which is necessary in order for us to do our final preparation.

As you know, on the defense of this case we are basically counter-punchers, we don't have the burden of going forward. But we must know what in the world the plaintiff is

witnesses are going to testify to, so that we can then get our experts ready. There are two mine experts, a Dr. Olsen and a Mr. Leonard, who are the only people I know of in the entire world who say the railroad did anything wrong with respect to that slide or causing the slide or anything else. While we have taken their depositions on one occasion, the occasion we took it on, if I might back up, there's something called a finite element analysis that Mr. Leonard did in conjunction with his masters thesis. It is on the basis of this finite element analysis that their two experts rendered the opinion that the railroad's cut at the bottom of the slide was a factor in causing the slide.

At the time we took the depositions we didn't have any idea what a finite element analysis was. We took the depositions, got some background, and said to Mr. Leonard, "May we have your program so that we can see what you did?" *We got his program. We tested his program. Now it's time* to talk to Mr. Leonard and talk turkey with Mr. Leonard with respect to his programs and any failings that that program may have. For two reasons. One, it may lead to a summary judgment in this case. And for the second reason, it allows us to get our experts ready to confront anything that Mr. Leonard may saw.

We have been trying for over two months to line

doing so, we have not to this date heard one word as to when we can take those depositions. With respect to the answer, excuse me, with respect to the Order of this Court which was made 53 days ago concerning the amending of a complaint. We just got the amend, we just got the order the other day, which held up discovery. We tried to put together a scheduling order and a pre-trial conference order. And what we find out in a pre-trial on the pre-trial order is that Mr. Young has now included as witnesses everybody who is listed in the Utah Railway case versus the Denver Rio Grande, which I believe is four pages of witnesses that heretofore we had not had any knowledge of.

So without accusing Mr. Young of bad faith, I'm sure he's as busy as we are, at the same time he owes a duty of responsibility to us and to the Court to aid us in an attempt to get this case tried in a proper and efficient manner. We don't think he's doing so. For that reason we have come here today to seek to enlist the aid of the Court so that we don't have to lose our trial date, because we don't want to lose our trial date.

The second aspect, which is not in the letter of Mr. Olsen, is the problem that I have with the Court's Order on the motion to dismiss. As I read that Order, Mr. Young would be permitted to say that we were negligent for failing to

hadn't, even though our cuts had absolutely nothing to do with the failure of the mountain. That creates major problems for me. And really all we need is some clarification from the Court, it seems to me, that if our cut had nothing to do with that mountain falling, we don't have any more duty or responsibility to drain that mountain than do the people of Thistle, the State of Utah, or anybody who is in the vicinity of the bottom of that mountain.

Only if we did something that would cause that mountain to fall down would we under the Court's Order, I believe, have any responsibility to do anything on that mountain. We may have some responsibility on the portion which we own. But we can't have any responsibility if we didn't do anything to cause the thing to come down. And what I was frankly seeking from the Court was -- If I might add, also Mr. Young conceded that in the oral argument on the motion to dismiss that if our cut had nothing to do with the failure, we don't have to fix the mountain. But that's not the way the pleadings read. The pleadings read we would be negligent for failing to fix the mountain even if we didn't do anything to cause it to come down. And I was hoping that perhaps also today we could get some clarification from the Court of that. I don't know if the Court is remindful of what went on during that hearing or the specific issues

If the Court needs no specifics on the lack of cooperation, I would defer to Mr. Olsen, who is much more on top of it than I am. Thank you, your Honor.

MR. OLSEN: If I could just mention one thing, your Honor, that did come up. I was concerned at the time that we argued the motion to dismiss that we get these depositions on schedule. And I asked Mr. Kester at that time to get me some dates, and have continued now from March until today in June, and have no dates.

Also we were concerned at that time, and I think what is mentioned during the hearing, that we get a scheduling order here. And I think the Court directed us to use the previous scheduling order as a guideline. So some days after the Court issued its ruling, I submitted to Mr. Kester a proposed scheduling order. Mr. Young did call -- on that order but did never determine any proposed dates. We have no schedule except we have an August 14 trial date. And certainly that's not our wish to have things up in the air. I'm sure it's not the Court's wish. But unless I can get some agreement from counsel, we have not even a discovery cut-off motion, cutoff date by which voir dire and jury instructions will be submitted, trial brief, pre-trial order. And I'm concerned that we get these dates agreed, to have some deadlines to shoot for. And I would like to think that

been two months now. And I have had numerous phone calls not returned, numerous letters not responded to. And I can count, you know, two calls total from Mr. Young's office in that period of time and one meeting, which I initiated, on Friday when I delivered my letter to them. And I met with Mr. Kester. I don't mean to point any fingers.

We are at a point where, if we are going to be ready on August 14th and have a fair chance to defend ourself. We've got to get things solidified as to schedule.

Mr. Richman did mention that, I guess, five pages of pre-trial order in this Utah Railway case. And if the Court remembers, that was a Federal case in which the two railroads -- were at odds over who is going to pay the bill for the cleanup down there. And because our firm represents both plaintiff and defendant on a former retainer basis, we have -- this litigation and other firms handle it theirself. I have not had ready access to any of the materials in that case and have made very little attempt to familiarize myself with them. That is up until three or four months ago. The issues in this case were entirely different.

Mr. Kester gave me on Friday this list. I count, looking at it, approximately thirty people. Of those approximately 25 are in addition to those already named in this pre-trial order draft that has been framed by counsel before the

names. And I don't know in looking at this how many of these people Mr. Young and Mr. Kester are serious about calling in the case. And are they planning to use some of these depositions? And if so, we'd like to have copies of those to know if there is something we need to do to clarify the record on our behalf.

We are six weeks away from trial as of this coming Monday, and that's a scary situation to find yourself in. And I think we are entitled at a minimum to get a commitment out of Mr. Young, and a clear statement of who he's really going to call as witnesses so we can take whatever additional discovery might be appropriate and know what to expect for trial. And I think that's the minimum. And I think we were entitled to that many weeks ago. And I apologize to having to draw the Court into this in order to get that information.

THE COURT: Well, let's find out what your claim is, Mr. Young.

MR. YOUNG: Thank you, your Honor. Your Honor, Mr. Kester has left for Seattle on another matter today, and I cannot speak for him and his relationship with Mr. Olsen. I would like to state a couple of things. Mr. Olsen is a good letter writer, and I need to become a better letter writer, and everytime Mr. Olsen doesn't provide something that I've requested I need to begin to writing letters

Your Honor, the truth of the matter is that I have been very busy on the USX case and have turned much of the labor over to Mr. Kester. On the other hand, when I got this letter, after I quit steaming I went to the records, went to the documents, went to everything I could do after getting back from Pittsburg Saturday, worked on this case yesterday and worked on this case today. Had some motions, had some orders to compel, have a motion to continue this trial, your Honor. And I'm willing to have that heard today or give Mr. Olsen an opportunity to respond to it and we can talk about it another time.

But I would like to point out a couple of things. Your Honor, in 1987 we asked in interrogatories the defendants if anyone had made a similar claim that we had made against the railroad. Their answer in those interrogatories, I've attached a copy of this to my motion to compel, your Honor, which I provided to the Court and counsel, was that there wasn't. We subsequently learned that there was the other lawsuit.

Now counsel says they'd certainly like a copy of the depositions in that case that we may intend to use. Counsel represents the Utah Railway, represented the Denver & Rio Grande Railroad. And I have today here a copy of a notice of deposition for all ranchers dealing with that case

records deposition in that case, so I can get those records come next Wednesday.

Their client, both parties to that litigation were their clients. They reason they didn't, weren't directly involved is because the president of the railroad was the president of their law firm, the president of Utah Railway. We have sought to find out about that case for over two years. They won't tell us a word about it. So we are going to have to notice up depositions.

Your Honor, I have brought a list that is two pages, well, a page long.

MR. RICHMAN: Your Honor, this is, if this is with respect to a motion for continuance, I do object to this. I find this totally irrelevant.

THE COURT: Well, I'm not going to continue this case, counsel. You've fiddled around here long enough. I want to know who you are going to call, Mr. Young. You certainly have known about this lawsuit for a long time. It's a Federal case, it's got to be filed some place.

MR. OLSEN: Your Honor, I remember in effect we, we talked about it, Mr. Young represented from the court that he had all the records coming over from Denver.

THE COURT: Well, let me hear him.

MR. YOUNG: Thank you very much, your

-- in Denver. The expense of that is prohabitive to my clients. The more I've rationalized and thought about this case, your Honor, I realize that these people represent the railroad, who was the defendant in this action, these people represent the plaintiffs who were the plaintiffs in that action, and therefore I intend and will and hereby do serve a notice of document, production of documents, deposition on them for next Wednesday. And I'll see that that's recorded with the Court. So that we can get copies of those.

Your Honor, the reason that I have listed each and every person that was listed by the plaintiffs in that case is I can only believe that those people have information about the negligence of the defendant. The defendant knows that, the railroad knows that these people who represent both the Utah Railway and the Denver & Rio Grande know that until I can talk to them and see their depositions, most of those peoples' depositions were taken in that case, and until I can read those depositions, counsel says he doesn't have them, I think he does, but if he doesn't, it's his client, on both sides, so he can certainly have them and have them available for me.

I also, your Honor, have prepared a motion to compel discovery against these defendants. In this matter there have been, let me give you an example. I sent out interroga-

specific questions. They finally answered those, hand-delivered last Friday afternoon, over six months. And then they answer them as follows. I asked for all sorts of records by Shannon & Wilson. I asked for all sorts of photographs. Let me give you an example, your Honor. Mr. Ozment, who is a key player in this whole case, took a whole bunch of photographs of this scene. I requested all of the photographs Mr. Ozment took. Counsel, in the answers to interrogatories, tells me he didn't take them on behalf of the railroad, he was at that point in time on his own behalf. Well, first of all in his deposition Mr. Ozment is working for the railroad 24 hours a day. And we asked him on whose behalf he took them. And he said, "I don't know." Secondly, I suspect we'll see some of those on behalf of the defendant when we get to trial. We are entitled to those.

At Dr. Morgenstern's deposition, your Honor, we asked for a copy of a deposition in another slide case. Mr. Olson said, "I'll provide that to you." That was in November of 1988. He has not provided that. Our experts cannot come to conclusions until all of the discovery we have asked them to provide be made available to us, and all of the -- And I don't think that Mr. Olson has an opportunity to respond to my motion to compel. I think he has an opportunity to respond to these questions, when he said, "sure, I'll get that

I asked Mr. Hiltz, "Can I have your CV so I can look it over and prepare -- witnesses?" "Sure, I'll get that to you." Never has been done. He hasn't provided anything that he's agreed to provide pursuant to the depositions. He hasn't provided Mr. Morgenstern's deposition. Let me, I've got about 12 or 14 things I've listed in this motion to compel.

Another thing I asked them in 1988 or 1987, who the experts they consulted, the primary experts they consulted were. They told me about Shannon & Wilson who, in Mr. Wilson's deposition said, "We were first retained in 1983." Thile through all our discovery and the limited discovery that we have been able to do in the Utah Railway case, we find out they had a man named Eublacker. So we asked them again about that and we say, "Wasn't Eublacker retained by you as an engineer?" And they say, "Yes." And we say, "Give us all of his reports to you and your reports to him as an engineer." They say, "It's not relevant." We want all of those reports. We think they are relevant. We think they have to do with slides. We think they have to do with prenotice of slides. We think they have to do with their ability to come in here and do something about this slide mass. And we want those documents. Our experts need those documents.

preparation for discovery. It was my understanding that the reason that the defendants wanted to take the depositions of Mr. Leonard and Mr. Olsen were this: Mr. Olsen in his deposition said he may complete an area of discovery with regard to this I believe it's the finite analysis. Mr. Leonard already gave them that information. Their depositions have already been taken. They can prepare to cross examine them based on the depositions already taken. I talked to Mr. Olsen yesterday. Mr. Olsen is available for depositions later if the Court so instructs. But he has not completed his finite analysis at this point in time. He wants to see Dr. Morgenstern's books. He wants to see Dr. Morgenstern's articles. He wants to see Dr. Morgenstern's reports on this matter, in the Utah State Rail case, which Mr. Olson has agreed to give us, the reports on the Utah Railway case. He wants to see Mr. Slausen's reports. And then he says he can go forward and do these other studies that he can prepare.

I don't know under the rules if they are allowed to take an expert's deposition twice. Dr. Olsen is available on the 19th or 20th of July, in case he needs to be available. Mr. Leonard said almost anytime in July he's available. I don't think the purpose of a deposition, your Honor, is to take a deposition, break it down and retake a deposition.

They had an opportunity to take him. I won't make a big deal about retaking Dr. Morgenstern, I'll deal with him when he comes to Utah, if I have the reports he's written and if I have his vitae and those other documents that counsel agreed over a year ago, and some not a year ago, some in November of '88, to provide for us. Your Honor, respectfully, and then I'll sit down and shut up.

As an officer of the Court, I must tell you that I have been working significantly all of the time on my USX case, and therefore have turned this case primarily over to Mr. Kester. The firm of Spence, Moriarity & Schuster told me that they would come in and try this case for us and prepare it and get it going. I talked to Mr. Moriarity, and Mr. Moriarity indicated that he could not do it in August and he would not even get involved if the trial was going to be in August. And I told him the judge had set the trial in August and there is nothing I can do about that.

It is my opinion, your Honor, that until we have all of the records of that negligence action that was settled in Salt Lake City which they have access to and I can go over all of those things including the witnesses and the depositions, in candor, your Honor, both of those parties had deep pockets, both of those parties hired excellent witnesses, both of those parties in -- hires an expert out of Southern

Both of them spent a lot of money in preparation for this case that my people have not been able to afford. I need to see those records. I need to see those depositions. Then I can tell who are those people he intends to call. I can't do it until I see them. I admit that that is my fault for not having served this records deposition earlier. I intend to have it by next Wednesday.

If the Court makes us go forward in August, we'll be ready. But I do move at this point in time, and I'd be happy to have counsel respond to it, to continue on the basis that discovery is not complete until I can get those. Until they fulfill their commitment that they made in the depositions, until they answer the interrogatories that we have propounded, we can't be ready and our experts can't be ready.

THE COURT: Now, Mr. Richman.

MR. RICHMAN: Your Honor, I think we are as close to a Rule 11 as I've ever heard. Today we have a total amendment to the complaint, throwing in all new causes of action, only to find out that Mr. Young really doesn't have any evidence until we supply him with certain information. It seems to me there comes a point in time that if you are going to put something down on a piece of paper which causes an increase in the litigation, causes a continuance in the litigation, and don't have one scintilla of evidence

But it seems to me that what we have got here, especially with Leonard and Olsen, they make certain statements and then provide us with what's called this "finite element analysis," which is a computer program; we take the computer program and we run it, and that creates new questions for us with respect to the way we ran it.

What really offends me today about what Mr. Young says is we have not heard one word up until today, and we have been trying for three or four months to get these depositions, not one word up till today that they may hesitate in permitting us to take those depositions. They always said, "We'll get a date, we'll get you a date." So we jerk around for four months until finally we have to come into this court and ask for help, when in fact they are thinking maybe they are not going to let us do it at all, which requires us to make some motion to compel. To me that is a total lack of integrity with respect to the judicial process by Mr. Young's office. I can't comment specifically about some of the things that purportedly Mr. Olson was supposed to supply. I would like to have Mr. Olson have an opportunity to talk about it.

But a continuance at this date, your Honor, I think is a total travesty of justice, and I think Mr. Young has played fast and loose with us. Hopefully, he hasn't done so

for us to be ready for trial, and we'll strenuously oppose any further continuance in this case.

MR. OLSON: Just on the specifics, your Honor, since Mr. Young has now and for the first time to my hearing made comment about certain things he said he didn't get.

He mentioned, first of all, the answer to the December '88 interrogatories. The Court will recall the discovery cutoff on that was December 31. And interrogatories were filed less than 30 days before that cutoff. And until the time that the Court ruled there should be an amendment in February, there was no obligation for us to respond to these interrogatories, they were not --

When the amendment was proposed and we made our motion to dismiss, I advised counsel, and Mr. Young is, on several occasions -- respond in interrogatories which dealt with the April when and if the Court rules against us on the motion to dismiss. The Court ruled against us approximately 60 days ago. On Friday I finally got the order that would memorialize that ruling. And on Friday I delivered those interrogatories to Mr. Kester, and I did exactly what the rules of procedure -- If they wanted them any sooner, they could have proposed that order 55 days ago. There was nothing that prevented them, when they would have received the

three lines long as it was. I don't know what happened there. I have been at a loss, I haven't been able to -- And I don't even know if the Court has actually entered the order yet, but we want to get the case moving along.

THE COURT: Well, I haven't entered because the time under the rules hasn't expired for you to object if you want to.

MR. OLSON: Well, our feeling was to get these other things on file, because frankly we have no objection, your Honor. We are willing to have that entered as stated, however with the copy and the clarifications that Mr. Leonard made that might appropriately be addressed in that.

Second, the Morgenstern deposition in another case, I told Mr. Young at the time Mr. Morgenstern thought he had a copy of that deposition. He does not. I told Allen on the phone less than a month ago about that fact. I gave him the name of the case and the attorneys that were involved and they can call them up and get. But I have no obligation to give them that when it's not been in my possession or in the -- advised them that I could not keep because the -- he said he had a copy of his deposition but they can get it. I assume it's a phone call away, if they talk to the right people.

proposed analysis of the slide. That was a year ago that he told me he was going to do some limit equilibrium analysis of the slide, and he indicated that he was going to proceed to do it. They tell us now with less than six weeks to trial that analysis isn't completed. I'm at a loss to know why that is.

There's reference to a report by our expert, Dr. Morgenstern, in the Utah Railroad case. They know full well from his deposition that no written report was prepared in the Utah Railroad case. I've advised Randy of that independently on the phone. After talking further with Dr. Morgenstern, the fact is there's nothing to give. And that's why they received nothing. And I just, you know, every point that Allen has brought out here, the question of the records in that Federal Court litigation, there's never been a request made to -- directly to give him those. Our firm couldn't handle it. We couldn't. What we've got to do is to go to other counsel and ask them to dig out, if they want to. I'll be happy to call either the -- and say Mr. Young will be in touch with you and as far as we are concerned you are authorized to provide him with the depositions in that case and pleadings in that case, the things he would have found had he had access to the records in Denver. But that request has never been made to me. Now they want to take a

we have to prepare. I think that's a major imposition. But we'll do our best to make that available to them. Now that we know they want the, all people have to do is ask, and Allen knows full well that I've talked to him on the phone and talked to Randy on the phone on nearly every one of these points, and I think this is just an attempt to try and shift the focus from their lack of cooperation, their lacking, to somehow suggest that this is a two-way street. And I state, your Honor, that we have bent over backwards to make sure it is a two-way street, have tried to give them every opportunity to similarly comply.

MR. YOUNG: Your Honor, just to summarize. I will file this motion to compel. We can talk about each and everyone of those issues at a time when each and everyone of these people have opportunity to respond to it.

In regards to a telephone call with Mr. Olson where he told me Mr., Dr. Morgenstern, is simply, that's not true.

THE COURT: Well, I'm not going to decide which one of you has a short memory.

MR. YOUNG: He may have talked to Mr. Kester.

THE COURT: Nothing before me that I see that I can rule on today except to indicate to you I'm

event. And there's nothing before the Court except some generalities that you talked about. I do have a date of July 19th and the 20th that you can take these depositions of these persons that you've indicated. And I suggest that you get your notices out and get those depositions taken. I don't know what else to do with you, counsel, except to direct you to the Rules of Civil Procedure and have you follow it in writing, and that's about all I can do. Simply make your motions, I'll rule on them as they are presented. I have nothing before me today to consider. I'm disappointed in the way that the matter is going. But it appears to me that there's been adequate time for all of this to have been taken care of.

If you need to make your record, get your motions filed so that whatever I do you've got some basis on which you can take the matter up to higher levels. If you are satisfied with what I do, then I suppose one or the other of you is going to be, maybe both of you will be, but in any event I don't know that I want to get into a position of having to assess your individual reputations and the truthfulness as to what you've done. Put it in a form of your motions.

My expectation was that when this trial date was continued that the scheduling order would have just been

extended. And that that shouldn't have been too much of a problem.

In answer to your question, Mr. Richman, it does appear to me that the basis of their claim for any 1983, prior 1983 matters have got to be based on negligence. Obviously, they are going to have to prove that he did something that was wrong. Otherwise, they don't have any standing. But if they have got evidence and can establish it or prove it by the upsetting the toe or perpetuating that circumstance, that that was a contributing factor, then maybe they've got, what I intended to say, I don't know if they've got any evidence, then I think they ought to have a right to present it. But they've surely got to show that something that the railroad or someone for whom they are responsible was negligent in what they do. Either in, in perpetuating the situation or in initially precipitating it. I don't know what the evidence is, and I expect that's what we are going to try to find out at this trial.

MR. RICHMAN: I appreciate this, your Honor. I want the Court to know that we didn't come here to seek to impose sanctions on Mr. Young or, frankly, to get the Court to render any orders. What we thought we might accomplish by this is, frankly, make this a kind of a status conference so the Court knows where things are going.

not goint anywhere at this point very satisfactorily. And it's obvious, Mr. Young, I can see this, that if you are overburdened in what you are doing and you've got, Mr. Kester is a capable person, whether or not he's taking care of the office to support you while you take care of another case, I don't know. I suspect that that may be part of the problem. You've got, you are out of there and you are not in that sense able to devote enough time to help with all whatever else that you may have going. But I can't solve that problem. But it appears to me that you are competent counsel, all of you, and certainly you ought to be able to sit down and resolve these things. And if you can't, all I can suggest to you, you've got rules of civil procedure, and we'll have to go by the book and let the chips fall where they may. I hate to see that. Lot's of times we can accomplish a great deal more by cooperation than otherwise. But when that fails then we have a rule to fall back on we have to resort to.

So I'm going to direct that whatever motions you are going to file that, either to compel or any purpose, that we ought to have those filed no later than ten days from today. So let's get this up to the snubbing post. And I'll try to rule on it. But I'm not going to grant your motion to continue this trial, Mr. Young, at least at this point. And

calendar to take two weeks now that I can't fill at this late date; counsel say, well, I can't, I want an early trial date,you give them that, how long do you mean or next week, no, no can't do that, no; what you've done is to put at least two weeks of the Court's time that's going to be lost or wasted. Not necessarily wasted, I can find things to do. But it doesn't satisfy the public in getting their cases heard and taken care of.

So I'm very reluctant to even contemplate such a possibility. I want this case tried. And your clients are entitled to have it tried. And if the inability to get it tried is because there's some lack of cooperation between you, that's unfortunate.

So file your papers, and we'll get at them as quickly as we can.

MR. OLSON: Your Honor, one issue, a scheduling order. Would you like us to get agreement in ten days and submit something to the Court?

THE COURT: Yes. Let's get something in writing, men, so that whatever happens that you've got, if you are satisfied with what takes place, you've got a record on which you can take it up and protect yourselves in that regard.

MR. OLSON: Would the same be true with

ten days?

THE COURT: Yes, I want this all done.

MR. YOUNG: Your Honor, when the trial was scheduled in February Mr. Olson and Mr. Kester attempted to come up with a pre-trial order. And it was my impression, and I've discussed this with Mr. Olson since then and told him that I believe it's impossible.

THE COURT: Why is it impossible?

MR. YOUNG: Well, because I think that they think that we tried to put things in there, and we definitely think they tried to put things in there, that aren't really the issues at fact and try to misconstrue what the issues are. And we tried back and forth and back and forth, and finally we just threw up our hands and said, look, we can't agree with you on what the issues are here, we think they are simply, we thing they are negligence, and we think the defendant was negligent and they caused the injury that these people, they were a cause of the injury to these people. And if they want to put a pre-trial order that that's the situation, then we'll be happy to. But Mr. Olson seems to want to put things in there as uncontrovered facts that certainly are contested.

THE COURT: Well, it seems to the Court that if you are in dispute as to whether they are agreed on,

MR. YOUNG: Yes, sir.

THE COURT: That seems rather elementary if you don't, and I've never been able to understand why two lawyers can't sit down and agree that one says this is what I claim and the other says this is what I claim. Maybe that is expecting too much. But I can't for the life of me see why that can't be done, that your pre-trial order cannot set forth those things that you legitimately and honestly claim and at least narrow it down to some extent. If you can't narrow it down any greater than the pleadings and the complaint and the answer, why maybe you don't accomplish a heck of a lot. But I would expect that you ought to be able to do better than that.

MR. OLSON: Your Honor, just so it's clear here, the record: Mr. Young has in his possession and has probably for ten-fifteen days a draft pre-trial order that includes everything he ever asked to include and anything we ever asked to include, and there's one disputed fact in the entire thing and everything else is undisputed. As we rightly acknowledge, we aren't in agreement on a lot of things. I put that to his office and awaited a response. I think it's basically been everybody -- in a pre-trial order. And since we've looked at it and talked about it, I'm sure we could agree that we disagree and submit it to the

THE COURT: Well, what I'm concerned about are these witnesses. Why can't you delineate who it is you are going to call? You don't know at this point, Mr. Young?

MR. YOUNG: Your Honor, we have delineated the experts and people and individuals that we do intend to call, in terms of Dr. Olsen and Dr. Leonard and others. There is a plethora of witnesses that were listed by the plaintiffs in that suit whom I've got to talk to in the next 40 days, and they say some of things --

THE COURT: You've got to talk to them a lot sooner than that, Mr. Young. I say, you'd better find out and talk to them within the next ten or fifteen days.

MR. YOUNG: Well, as soon as I get the deposition in that other suit, I think we'll have talked to most of them, because most of them have had their depositions taken. That's the point. For instance --

THE COURT: The trouble is for reasons that may be important, put off doing what ought to have been done a long time ago. And that in my judgment isn't any reason to continue this lawsuit, if you haven't done the legwork that you ought to have done. And you each are entitled to know who it is you are legitimately going to call. Do that you don't end up in surprises. And if you don't dis-

can do is to make an order they cannot be permitted to testify. And that's unfortunate. So that you say they've got these records. If they are, if they don't have them and they are as easily available to you as to them, there's no reason to expect that they have to produce them.

MR. YOUNG: Your Honor, they are the defendant. They are Denver & Rio Grande Railroad.

THE COURT: That may be. But if they don't represent these people in this lawsuit, then they may not be in a position to do anything about it. So that's, they may have a representation on other matters, but if they are not counsel on these lawsuits and somebody else represents them, there's where you need to go.

MR. RICHMAN: Your Honor, I'd like just to make an oral motion to quash this deposition next Wednesday. I represent to Mr. Young we do not have these documents. We'll of course call counsel and on that case and advise them that if they want to turn it over to Mr. Young we have no objection to doing that. But they have noticed now our custodian of records, and we just don't have the records.

THE COURT: Then say I don't have any documents. That's all you can do if that's what you are --

MR. YOUNG: Your Honor, may I speak to

THE COURT: Yes.

MR. YOUNG: I've sued companies, I've sued Ford Motors, General Motors, and I've asked those companies for the records of a certain case or cases. The law firm that deals with Ford Motor Company may be a Salt Lake law firm. The Ford Motor Company, the defendant has access to its documents. And litigation filings, it would be like if you sued me, your Honor, and I hired Mr. Olson to represent him, and Mr. Olson said, well, your Honor, Mr. Young may have the documents but I don't because I didn't let him in that litigation, he's the one that goes to his client and says get those records, they are yours, you paid for them, you own them, get them. Now I suppose what I'll do, too, is serve depositions subpoenas on both other law firms and see where that gets me. But --

THE COURT: Well, you do, I say, if you can't agree --

MR. YOUNG: We'll follow the rules.

THE COURT: And you follow the rules, then we'll have to decide. I don't know what else to tell you.

MR. OLSON: I'm more than happy to work out of here now and if I can reach the appropriate -- that as far as we are concerned, he can have access to those

THE COURT: Well, I do think this, that as general counsel for these people, if you have authority or can get form your client records that are discoverable, you ought to produce them.

MR. OLSON: Their attorneys have them.

THE COURT: I'm not deciding that at this point.

MR. OLSON: I'm offering to do that. I think it's as simple as a phone call to the proper person.

THE COURT: What I say, it seems to me a lot of this is simple if you'll just do it.

MR. OLSON: We don't know -- we don't know anything nor --

MR. YOUNG: I've asked the other attorneys to talk to me about this and never thought --

MR. OLSON: He's never asked me to talk to him.

THE COURT: Well, he's can't you two discuss -- and so I suggest you ask him.

MR. YOUNG: I, here on the record, ask him.

MR. OLSON: I'll go to the phone right now.

THE COURT: Well, I'll grant your request.

MR. YOUNG: Thank you, your Honor.

THE COURT: Read through your papers, then do what we can.

(WHEREUPON, the Court recessed at 4:58 o'clock p.m.)

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REPORTER'S CERTIFICATE

I, EDWARD V. QUIST, hereby certify that I am an official court reporter for the above-entitled Court, duly registered and licensed to practice in the State of Utah; that on the 27th day of June, 1989, I appeared before the above-named Court and reported the proceedings had in the above-entitled cause of action; that the foregoing pages, numbered from 1 to 32, inclusive, contain a true and accurate transcript of my stenographic notes, as taken in the above-entitled hearing, to the best of my ability.

Dated at Provo, Utah this 20th day of July, 1989.

Edward V. Quist, CSR
License No. 71
310 County Courthouse Building
51 South University Avenue
Provo, Utah 84601

Tab 4

C O P Y

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR UTAH COUNTY, STATE OF UTAH

- - -

ROBERT BERRETT, GERALD ARGYLE, et al., Plaintiffs, vs. DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, INC., Defendant.	Civil No. CV-86-616 TRANSCRIPT OF HEARING

BE IT REMEMBERED, that the above-entitled matter came on regularly for hearing before the Honorable Cullen Y. Christensen, Judge of the above-entitled Court, on the 3rd day of August, 1989, commencing at the hour of 12:34 o'clock p.m., at Room 310, County Courthouse, 51 South University, Provo, Utah;

That there appeared as counsel representing plaintiffs, ALLEN K. YOUNG, ESQ., and as counsel representing defendant, MICHAEL F. RICHMAN, ESQ. and ERIC C. OLSON, ESQ.

WHEREFORE, the following proceedings were had:

- - -

THE COURT: The matter before the Court

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is Case No. CV-86-616, Berrett, et al., vs. Denver & Rio Grande Western Railroad.

Mr. Young, you are appearing for the plaintiff?

MR. YOUNG: I am, your Honor.

THE COURT: And Mr. Olson and Mr. Richman, for the defendants?

MR. OLSON: Yes, your Honor.

THE COURT: This matter comes to the Court by way of your motion, Mr. Olson.

MR. OLSON: Yes, your Honor.

MR. YOUNG: Mr. Olson, could you use that podium?

(off the record)

THE COURT: All right.

MR. OLSON: Your Honor, briefly, just a little background. This motion is brought as a result of a witness list that was provided to our office on Tuesday, August the 1st, by Mr. Young. The history, I guess, of that witness list deserves a little explanation.

You'll recall in January Mr. Young and I appeared before the Court with respect to the question of whether or not in the contemplated February trial the issue of pre-April 1983 negligence would be before the jury. And after some discussion, Mr. Young indicated, among other things, that he had become aware of litigation that occurred sometime ago

between the railroad and Utah Railway, which we call the Utah Railway Litigation, down in Federal Court. And he indicated that he was getting those files and planned to review them and wanted to go forward with the trial date. But the trial date was putoff until August 14. In connection with that February trial date, the Court will remember there was a scheduling order. As part of that scheduling order, I recall that Mr. Young, and perhaps Mr. Kester, sat down in the Court's chambers, and that was back in October of '88, we came up with a series of schedules by which certain things had to be done. One of those items was that a witness list would be exchanged by November 14th. And if my calculations are right, that's approximately, nearly 100 days before the trial date. When the Court gave Mr. Young leave to amend his pleadings and the various motions had been filed and rulings had been made on our motion to dismiss. I forwarded to Mr. Young a draft proposed scheduling order basically incorporating the same deadlines that had been implicit in the previous scheduling order. But just moving them into the August 14th time frame I did, I think, save twenty days off of the witness list. Because it was clear that by the time they got the proposed order that I was tendering to him that time period, 90-day time period would have run. I heard nothing back from them at all with respect to that scheduling order, and as things stand today, there is no scheduling

order in effect in this case.

However, it has been our concern for a month now, since that new, that new data was available to Mr. Young, according to what he said in February; our concern was what of that, if any, he is going to use. Because the railroad is rather unusual in that respect, since it was a participant in that litigation and, arguably, has to answer for whatever -- happen to be generated in that, and otherwise make admissions whether it was properly represented.

So it has been a matter of concern for sometime. And I've raised it for Mr. Young and Mr. Kester on various occasions for us to know definitively what their witness list was; what, if any, materials they chose to use from the Utah Railway case. It came as something of a surprise to us, in June of this year, when we were before this Court on a prior occasion and Mr. Young indicated he still had not obtained the Utah Railway material. And at that time we talked with, as promised here in court, talked with the counsel that handled that litigation and made available to to Mr. Young various boxes of pleadings and depositions, included with seven large boxes of depositions. Total depositions I think numbered in the neighborhood of around 73. When I received Mr. Young's -- let me back up and just mention one other thing.

About a month ago, I continued to express my inter-

est with Mr. Young in getting his definitive witness list. And at that time he hedged and hedged, and I finally said "well, can you get it to me by August the 1st?" We set a sort of an outside date. And he indicated that he thought he could probably do that. I made no promises that that was an acceptable date until I had seen what was on the witness list. But I assumed from what he was saying there might be one or two additional people at least. That was the impression I got. And I certainly don't think that he necessarily said that insomuch as witnesses are -- on Tuesday when we received this witness list we had been going by a list that had been generated some months before. And to that list had been added five individuals, excuse me, seven individuals as may-call witnesses.

And in addition to that a Mr. Shroder; an expert who wrote a paper sometime ago; and a Mr. Hinsie; two gentlemen by the name of Archuletta; and a Mr. Vincent who is a former official with the, and as I understand, the Utah Department of Transportation; also a local individual down here in Spanish Fork. In addition to that the list also included a list of depositions from the Utah Railway case that Mr. Young proposed to or may read to the jury. On that, with the entire roster of 73 depositions that were taken in the Utah Railway case, that's seven boxes worth, not counting exhibits. And I asked Mr. Young if he was, could be any more

specific as to what portions of the depositions, which depositions he could contemplate using. And he indicated that, at that time he was rather confident as to two individuals, but he could noteliminate from consideration any of those depositions. I pointed out to him that we were twelve days before trial and that that seemed rather an imposition on us since we can't read his mind or know exactly what we have to prepare for.

I remember when I was in law school that in connection with the rules of civil procedure the comment was made or the characterization was made of "trial by ambush." I consider that the list received on Tuesday alone is the prelude to a trial by ambush. And I think that the comsumation of that will be when Mr. Young actually makes his choices. And we are placed in a position where we can't get ahold of people to appear to clarify their testimony if that's necessary. We haven't the time even now to go and depose the people that were previously deposed in that litigation, people whom we may not have asked any question; because they were our employees, and we had no reason to believe we couldn't call them to trial at that time, or they at least give us an opportunity to read what they have to say. Because, so we have 73 depositions he's identified, and some of those in our possession. That's thousands of pages. And it isn't realistic for us to think we can read that, much

less focus on what Mr. Young may or may not use at the trial.

So our motion here is simply one to one of simply fairness. I think that implicit in the Court's rulings and the Court's orders up to this point has been that witnesses were to be identified in a timely fashion. We have gone forward on that assumption, with the expectancy if there was something in the way of an exigency where he couldn't identify something and he subsequently found out the dilemma, we would want to be practical and we wouldn't bring it to the Court's attention.

But in the case, for instance, of Mr. Shroder, we had an individual who wrote a paper back in '76 --

MR. YOUNG: Sixty-seven, counsel.

MR. OLSON: Excuse me. Sixty-seven. So that's, what, 22 years ago. Who was clearly identified by the expert that Mr. Young retained two years ago in this case. Not, this is no surprise. This isn't some individual who suddenly walked in off the street. This is somebody that people have known about for a considerable length of time. I don't know the particulars of why he hasn't been mentioned until now. But I do know that from what Mr. Young tells me, he's out in the East somewhere, far from where we are here. And he's going to present considerable difficulty to depose. And then we have to prepare our experts to deal with whatever it is he's going to say.

what he is going to say.

In the case of Mr. Hinsie, he's a well known local individual. It doesn't seem to me there is any newness about his availability to testify in this case. Well known local geologist. In the case of the other individuals, Archulettas and Mr. Vincent, I'm not sure how Mr. Young became aware of them, but again, I've heard no explanation and formed no understanding as to why he's waited until now to tell us. The only conclusion I can draw is that Mr. Young is basically popping a surprise on us. And I think that's unacceptable. It certainly presents a major problem in terms of trial preparation. Normally you prepare for trial by getting your jury instructions prepared, preparing your own witnesses, preparind documents, you went to present to the court; and that's rather a rush in and of itself. What we are doing here is what should have been done four or five months ago, after Mr. Young first found out about the existence of the Utah Railway case. And we could have completed it in a timely fashion, and everybody would have the fair opportunity to present their case and prepare to defend the case that's going to be presented against them. We are not in that position now. And we are not even in the position to know what it is Mr. Young wants to put on with respect to the 73 depositions.

So we'd ask the Court, in light of

acknowledging that we are doing this on a somewhat expedited basis because of the time constraints, nevertheless, we would ask the Court to exclude the testimony that Mr. Young proposes to add to his previous witness list; and, for that reason, to proceed on the basis that he has held out for the last six months as a basis on which he intended to proceed.

I don't think that it's fair for us to have to go out and at this late date do the kind of preparation that is implicit in what he is proposing by way of new witnesses. And with respect to those depositions, I'm at a total loss to know where to start, given the fact that all I have is 73 names, without the slightest idea of who he considers to have primary importance and what portions of those depositions he intends to read. And so we'd ask the Court to exclude those materials, exclude the, strike the witnesses that have been listed, and to let this case go forward as it has been prepared for some months.

Thank you.

THE COURT: Mr. Young?

MR. YOUNG: May it please the Court: Your Honor, I don't know why everytime Mr. Olson and I have a little dispute that the next day we are here before you. But I guess that's the nature of this litigation. It's probably going to continue to be.

By the

have had served -- Now, I didn't call your Honor back yesterday afternoon, and if we need to talk about it and then schedule it tomorrow, that's fine. I have served on counsel, last night, through the Data Fax, and then this morning, a motion to compel some discovery, that I'd like to talk about as well. I think those are issues that need to be resolved. But maybe do that at the end.

THE COURT: About how much time are you going to take? I've got a jury waiting. I'm not going to spend much time with you.

MR. YOUNG: Okay. Your Honor, I think that this is a very important case to my clients, very important case to the railroad. I think that I need, everytime Mr. Olson talks, to re-relate the history of this case. Mr. Olson and I have a fundamental disagreement about the nature of the discovery in this case, in that we believe we asked them years ago to tell us whether anybody had ever claimed that the railroad was a cause or was negligent in this case. Their response, and in their interrogatory misled us, and said that nobody had ever declared that they were negligent or a cause of this, of this slide. We relied on that. We heard through the grapevine that wasn't true. We talked with people who say "well, I had my deposition taken in a case." And so ultimately we sent someone to Denver, who got out of the Archives a copy of the [illegible]

that that was not a true statement, that there were negligence claims that had been made against the railroad for the Thistle slide by the Utah Railway.

Your Honor, I don't know whether I didn't think very well or what. I have over the years contacted a Gifford Price and a Wendy Faber, who work at two different law firms in Salt Lake City. They were very unhelpful. And the reason they were very unhelpful, your Honor, is simple. The Utah Railway, who is represented by one of the Salt Lake firms, and Denver & Rio Grande, who was represented by the other, settled their differences. Now they are in bed together again. They operate the tracks and they are business partners again. So they didn't have any desire to injure each other.

Well, I became aware of, through an independent trip to Denver, that there were lists of witnesses and lists of people whose depositions were going to be taken in that case. And Mr. Olson, who denied there was every any negligence action, and now since on the phone says, "oh, my, there were a few more depositions about that than I ever even understood"; asked me, "please tell me who your witnesses are going to be." And so I knew of that. I knew that it was out there. I knew it was there. I knew there were people that alleged they were negligent. I didn't know much more about that. Because, we've gotten in a letter writing campaign with Mr. Olson in June of this year. I answered him. I said, in

addition; this is, again, before I got all of these depositions; since the matter was settled, were never published, so therefore they weren't there.

So my next move, immediately, was to Salt Lake, with Lawrence -- won't work with me, I'm going to have to specify people. And if you'll recall, Mr. Olson said that he'd help. He just related to that he'd help. He went out of town. I was required to subpoena them. He and Ms. Wendy Faber got together and decided that I should see them. And then they agreed three days later to make them available to me, after Ms. Faber and Mr. Olson had gone over them. I've got them, and I've since had to go back and get eight or ten more. I'll stipulate that Ms. Faber said it was a mistake, an oversight, they missed a bunch of them. I'll stipulate that I don't have any evidence that's not true. But I got them.

But in June -- okay, weren't there. We wrote Mr. Olson a letter and told him that in addition to the witnesses that we've previously listed in the pre-trial order, it will be our intention to possibly call, because I didn't know what was there, all of the witnesses who were listed as will-calls or may-calls or whose depositions were intended to be utilized at the trial, as they were listed in the Pre-trial Order of the Denver & Rio Grande. Because I had that face-sheet, and I gave Mr. Olson a copy of that face-sheet that listed

most of these people.

In July I moved to continue this matter, because I was not ready, and because Mr. Spence couldn't aid in August. And your Honor says no, we're going to try this case. I've put everything -- my life except this case, and went to work on this case, and have been working hard on this case. I went up there and got the 73 depositions. Patty and I have been reading everyone of those depositions. There is a myriad of information about negligence and cause and why this darn thing slipped. Utah Railway had a whole bunch of money they are owed by Denver & Rio-- And they hired experts from all over the country, from California and everywhere, to say that they are a cause of this problem. And they had individual depositions of high-ranking Denver & Rio Grande officers who I have no access to. Mr. Olson tells me they are retired. I'll have to go serve them with subpoenas over in Denver, Colorado. So I have been reading and working as hard as I can.

I have been, I'll tell the Court where I, how I list all seven of the witnesses that I now possibly list. First two ex railroad employees, Burroughs, I think, and Waring are the ones I think I listed Mr. Olson won't agree ot have here. He says they are retired, so he has no control over the, subpoena them over in Denver. I don't think I have the subpoena power. I don't have the time and effort to get

Rule 16(f) materials

More research?

them. So I'm re-advising him that I'll read parts or all of those depositions.

Your Honor, in July--and then I'll get to the other five. In July, talk about "ambush," I talked to Mr. Olson and I told him I'm working hard on this case, I thanked him, I said, "you have really made me go to work in this case, I'm learning as much about this case as I possibly can." He said, "all right, let's get all of the witnesses, all of the exhibits and all of the witnesses by August the 1st." He writes me a letter. He confirms everything he does with me in a letter, in writing. And he wrote me another letter on August 12th. Ambush. I asked copies of the materials promissed. Okay. We agreed to exchange exhibit lists no later than August 1st. I did that. At that time, "you will also supply us with your final witness list, including the identity of any depositions that you propose to read." And then he advised me, "as of July 12th you had not identified with certainty those witnesses that you planned to call or whose names do not appear in the latest draft of the pre-trial order." He didn't say "get them to me today," I didn't have them that day, as a matter of fact, "and I'll go over the other five that I've listed." I didn't have them that day. We agreed to exchange witness lists August 1st. And he's got till today to give me his. He hasn't, didn't yet today; but we got until today to do that.

All the pre-trial orders included, your Honor, an addendum that any additional witnesses that are found, the other party will be notified ten days before the trial. So under any other -- pre-trial order, I've notified him who those witnesses are. Under our agreement I've notified him who those witnesses are. And I've told him who they are. And he said, "well, I'm going to call them."

And I said, "except for Mr. Shroder, who I deem an expert, you are welcome to talk to them; and if you want to make arrangements to take Dr. Shroder's deposition, we'll find a way to get it done." Mr. Archuletta, Mark Archuletta and Amos, were track foreman at Thistle. Their depositions were taken in the Utah Railway case. The Utah Railway and Denver & Rio Grande attorneys, for instance, they know who they are, they know that they are important people in that case. Mr. Amos Archuletta was track foreman on a piece of track. He has much intimate knowledge about the previous problem, about the, previous knowledge of the slope and the mass and the slide. All have important pieces of testimony, factual testimony. Mr. Mark Archuletta was the foreman in that piece of track prior to that.

THE COURT: When did you find out about him?

MR. YOUNG: I found out about Mark Archuletta and Amos Archuletta either when I got the deposi-

tion; I found out about Amos Archuletta when I got the deposition up at Salt Lake City at Wendy --

THE COURT: When did you do that?

MR. YOUNG: On the 15th of July, 20th of July. He agreed to testify, Saturday before last, he agreed to come to court. The first day I ever talked to him, your Honor, on about the 17th or 18th of July, in mid-July, we went to the slide area and he said, "boy, Allan, I really don't want to get involved." The record should reflect I know Mr. Archuletta; I have never spoken to him about this matter; I didn't even know he was a D&RG official. His son I used to coach on a little league baseball team. And I know Mr. Archuletta. Mr. Archuletta advises me that Mr. Mark Archuletta would certainly have some facts, because he was the road foreman prior to Mr. Amos Archuletta. So they both -- I've talked to them both over the last two weeks.

I advised Mr. Olson a week ago that I was going to have some additional witnesses. And he said, "I'm going to Canada." And our agreement was I'd tell him by the 1st. He wasn't in all last week. And I told him, by the 1st. That's the two Archulettas.

Mr. Vincent, your Honor, is a man I became aware of in about mid-July as well. He was the UDOT road foreman in the Thistle area. I talked to him on two occasions. He [illegible] last Wednesday or Thursday that he would testify to

some facts about his knowledge in this matter. I first met him in mid-July. His name came to me from Mr. Anderson, who was the UDOT District 6 representative, who's the gentleman I've always listed as a potential witness, as a may-call. That's three.

Mr. Shroder, I want to talk about. Oh. Mr. Hinsie. Your Honor, Mr. Hinsie is a BYU professor, has written plats, has drawn plats about the Thistle area, was listed as a potential witness. By the way, your Honor, Mr. Archuletta, Mr. Amos Archuletta was one of those potential witnesses who would be called or might be called in the Utah Railway-Denver & Rio Grande litigation, and his deposition was taken in that matter. Mr. Mark Archuletta was not listed, although his, although he was listed as one of the track people in that litigation. Mr. Vincent I think is really the only fellow whose name hasn't appeared somewhere along the way in this litigation to begin with.

I first, I started again when he got, when Mr. Olson was in town for his deposition on the 18th or 19th of July, about ten days ago. We went over, again, all of the pre-reports on the Thistle slide, and found several of them. One by a Mr. Rigby, one by a Mr. Hinsie, one by a Mr. Slosson, and one by a Dr. Shroder. I immediately started calling them. I was turning up all final rocks to see if they had ever had any conversations with the railroad, if

they had ever had any knowledge of what the railroad activities were, if the railroad had ever contacted them. All three of the main guys I tried to find: Mr. Rigby, Mr. Hinsie were in Washington D.C., and Mr. Shroder was in Wyoming walking over the Teton Dam disaster because of slide problems.

Mr. Shroder, particularly, wrote an article in, he wrote his doctoral thesis on The Slides of Utah, and particularly, items out of the Thistle slide, in his doctoral thesis; has photographs of it, has photographs of the railroad taking dirt from the toe of the slide, has, knew of it. I finally contacted Mr. Shroder last friday.

THE COURT: When did you find out about him, from whom?

MR. YOUNG: About Dr. Shroder?

THE COURT: Yes.

MR. YOUNG: Dr. Olson and I were reading over Dr. Slosson's report. Dr. Slosson's report, which is a report that I have had in my possession for many, many months, lists about five people that have written about the Thistle slide, including Dr. Hinsie, Dr. Rigby, Mr. Olsen and Dr. Shroder.

When I was with Mr. Olson on July the 19th or 20th, I agreed that I'd attempt to locate all of those men and talk to all of those men about the Thistle slide, because they had written about the slide mass and diagrammed it and platted it

prior to 1983, some of them as early as 1950.

I finally was able to contact Mr. Shroder. I don't want to represent everything he might say, because at this point in time I've provided him a significant amount of material, and he made some preliminary conclusions to me over the phone, which I would deem to be work product, but which are very beneficial to my clients and very helpful to my case. And if his conclusions are reinforced by the, by the depositions and things I've now sent him, then I would definitely want to call him as a witness. He's an expert. He's the guy that wrote for the Utah Geological Survey the History of Utah Slides. He's located in Omaha, Nebraska.

Now, I've told Mr. Olson on the phone, when I advised him of Dr. Shroder, if he wants to take his deposition, we'll find a way to get it taken between now and the 14th. But I'll advise iim what Dr. Shroder's testimony generally will be with regard to the issues in this case.

Dr. Hinsie, your Honor, I merely list as a fact witness. Dr. Hinsie platted the Thistle slide many years ago. He has taken students on trips, and would take them, before the slide, and show them the Thistle slide and tell them that "that's an active slide mass;" all of which is relevant to this case; all of which is just factual. I'm not going to ask him for any opinions about the conduct of the railroad nor conduct of anyone else, but merely to lay

foundation for his studies and his opinions of those things.

I don't think I have ambushed, I don't think I ambushed them, I think they ambushed me. They said we agreed that we exchange our witness lists. He knew he was going to list some more people. He said, "do it by August 1st." I did it by August 1st. And I don't think I've surprised him at all. These are people that he could have had contact with as well. And I don't think he's interferred with, with at all. The Archulettas are fact witnesses. if he wants to take their depositions, they are going to talk about the facts and the problems they had at Thistle, and what they did, what they observed with their eyes, and what they saw. Mr. Hinsie is going to testify to the same thing, what his observations of the road was, and what his observations of the slide was. Those three are just fact witnesses. Hinsie's going to testify, Dr. Hinsie, will testify to taking his students up there and showing them an active slide mass that was well known and well documented.

One of the issues in this case was whether the railroad knew about it. And became more obvious today, from the deposition of Mr. Beckwith that I'm right in the middle of, that that's going to be an issue in this case; whether it was active or old; whether the railroad knew or should have known about it. And so Dr. Hinsie's testimony becomes important at this stage.

Your Honor, with regard to the deposition, I have told Mr. Olson, Mr. Olson holds me to everything in the case, and so if I, I have, really, four depositions that I really intend to use, and the other 30 I don't, if I don't tell him about them, then he's going to stand up and scream to high heaven when we try this case that I didn't tell him I might want to use this deposition or that deposition. So out of an abundance of caution I said because first of all I haven't totally read them all yet, secondly, there may be just a paragraph or two which establishes the authenticity of a document, that I may along the way want to introduce, if there is a dispute about it, if he denies it exists or something like that. And so I don't know as we stand here which depositions I was to read. I can report as an officer of the court that I think it's horrible practice to read any deposition. I think the jury gets bored. I don't think that they like it. But there are some parts of some depositions that I think important. I'll give you an example. And I think it's, and I'm, just to show what I'm talking about, I think there's a Holtman who was a president or something of the company who, on deposition, was asked "Did you know there was a problem at thistle?" And he said "We knew there was a problem at Thistle there for years, we've got to do something about it some day." I promise you I'll read that to the jury. That is something I want to read

And there, the reason I listed Mr. Burroughs, your Honor, and Mr. Waring, I think those are the other two witnesses I've potentially listed, is I have no control over them in court. They are not going to come to Utah for me. And so I'm telling Mr. Olson that those two are once I'm inclined to read. I will be happy to try; and I asked Patty to help me with a list right now, and I told Mr. Olson on the phone yesterday; I'll be happy to try to tell you basically which ones I intend to read. Part of that, your Honor is a problem I have with Mr. Olson. Mr. Olson advised me, for instance, yesterday that Mr. Hilts is now reduced to a fact witness; although he was the expert geotechnical engineer that was supposed to be the all-knower in this case, now reduced to a fact witness in this case. And therefore I may have to read his deposition. I don't want to, but it may be required that I have to. There's a Mr. Waring, a Mr. Burroughs --

THE COURT: On what theory do you think those are admissible?

MR. YOUNG: Your Honor, I studied the rules a little bit yesterday, and I'll certainly make a record and supplement it with case law. But the record, the rule of law clearly is that if a man is an officer of a corporation, it's a defendant and a corporate defendant, and [illegible] where he is represented

sp they have, like Mr. Olson has just reported to you where they have a right to cross examine and ask questions; then they are admissible for any purpose in a trial of, in any trial. And this trial deals with the same issues. And the questions that I would read and talk about in those cases deal with the same issues: What did you know about Thistle? And: When did you know it? What problem did you have with Thistle? What pre-knowledge do you have of hiring geotechnical engineers? What pre-knowledge did you have of the railroad? Those sorts of things that are relevant to the negligence in this case.

I intend to read, if they don't make them available, and they tell me they are not going to make them available. So the only way I can get them in is read them. And I think that the law is very clear that I have a right to do that. They were represented, they are officers of the corporation, and I have the right to read those depositions.

Your Honor --

THE COURT: Well, counsel, I'm looking back; I made an order, directed from the bench, that within ten days of the 27th of June, that you would prepare and file with the Court a pre-trial order. That, apparently, has not been done, for whatever reason. In that pre-trial order it would have been expected that you list your witnesses that you are going to call. I'm not going to permit you to offer

the testimony or bring out any witnesses that were not designated or known by the July the 11th, 1989. And that would include, particularly, it seems to me, Hinsie, Rigby and Shroder, you've known about them, had access to them for a long time, Mr. Young. And now to bring them, if you are going to designate them at this point as your experts, and in an objection to it, I'm going to sustain an objection.

As far as the depositions are concerned, I'm not satisfied, Mr. Olson, that you were responsive to the discovery that was submitted. I think in the answer and the explanation that you've given is that there was no, and the request was, has been accused of causing or exacerbating the Thistle slide, the answer is: no, that really the only thing that was discovered, alleged in that proof, that it might have been prevented; I don't think that's a good faith response to that interrogatory. Seems to me that could have been answered with candor and could have been indicated a long time ago. So that I don't believe that you can claim any surprise by way of whatever may be discoverable or may be evident as a consequence of that proceeding. I don't think your answer is legitimate. I don't think it was appropriate.

But I'm not interested in having you read 73 depositions, sit here and listen to that.

MR. YOUNG: Neither am I.

THE COURT: And I want you to designate,

within five days, who it is you are going to call, and what of those you are going to try to get in or what you are going to try to put in, Mr. Young. You've only had these since -- or thereabouts.

MR. YOUNG: I think it's much later than that, your Honor.

THE COURT: But if we are going to have to sit here and listen to 73 depositions and 10,000 pages, we'll never get through with this lawsuit. But for that reason, I'm not convinced that this could not have been handled a long time ago, and I do believe that your position was somewhat put off track by the response that was given to that interrogatory. But as far as these other withesses are concerned, Shroder, Hinsie and Rigby, those people that were in these other reports, known about for a long time, Mr. Young; there is no reason why you couldn't have determined a long time ago that you were going to need to call these people. So that as far as those are concerned, Shroder, Vincent, Hinsie, I'm going to sustain the motion and not permit you to use those witnesses, because of an untimely designation of them.

It appears to the Court that if Archuletta was involved in this prior lawsuit, that they may be something or who was known to the defendant and ought to have been anticipated, and that had that answer been more responsive, that

it, all of this wouldnot have come about.

But today is, today is the 3rd. I want you to designate what portions of these depositions you expect to introduce or want to try to introduce. I'm not saying they are receivable, whether or not they may satisfy the rules of evidence. So if that turns out to be objected to, we'll have to rule on that issue. But I think they are entitled to know what of those you may have, purport to introduce in your case in chief. I'm not sure that you can be precluded from using them to impeach or for some such purpose, if there is a dispute in the testimony. But as far as his case in chief is concerned.

Now, today is the 3rd. I want you to have in their hands, not in the mail, in their hands, by the 9th, Mr. Young, a designation of which of these depositions and what portions thereof you expect to offer or propose to use in your case in chief. I don't know how else to handle it.

MR. YOUNG: Your Honor, I don't want to argue with you, but --

THE COURT: Well, you can argue, you have that right.

MR. YOUNG: Thank you very much. Your Honor, so that therefore I can call Mr. Archuletta?

THE COURT: Well, if he was one of those persons that were indicated in that prior lawsuit.

MR. YOUNG: He was, and his deposition was taken.

THE COURT: I don't see why you ought to be foreclosed from doing that.

Now, you can have your little say, Mr. Richman. You are looking at me like what have I done.

MR. RICHMAN: Judge, I never have any problems with the court. I would just like to speak on it. And I did not seek to defend or intend to defend the answer in the interrogatories. But I recall in February Mr. Young saying that he had gone to Denver, he had known all about the lawsuit, he had the list of all of the witnesses. So even if, your Honor, we misled in the interrogatory answer back in November, in February Mr. Young knew about these people. I think the most revealing thing that we've heard this morning is that Mr. Young, when he sought a continuance and couldn't get it, realized he had to do some work in this case. But that's only occurred within the last two weeks your Honor.

THE COURT: Well, be that as it may, I think you men or your clients knew about this prior lawsuit. I don't think your response, technically, I suppose you can say, if in fact the premise of that lawsuit was that it only, that the negligence alleged was, that it was preventable, that that really isn't responsive to that question. And your, I guess, you've got to learn to ask the

right questions. But I think in all good faith that that could have been responded to. I can come to no other conclusion.

MR. RICHMAN: Thank you, your Honor.

THE COURT: So to that extent, I don't think that the railroad can claim that they haven't know about it. And if Mr. Young had the names, I can see you had some problem in trying to get access to these files, maybe you asked about Mr. Olson, specifically, "help me to get them."

MR. YOUNG: I did.

THE COURT: You did ultimately, and he said, before the Court, the last time we were here, how as can they get. So as I say, it should have been taken care of a long time ago. But these other witnesses, Mr. Young, I can see no reason why you can come in at a late day and say "I decided to use them" because they have not been shown to you. Mr. Shroder, if he was writing papers and his name was referred to in other papers, that you've obviously had access to, --

MR. YOUNG: I have.

THE COURT: There's the time when you should have started digging.

MR. YOUNG: Your Honor, what you have indicated is true. His name has been available in other documents and reports and papers for a long time. There is

no question about that.

I need to make a record in the strongest way, particularly with Mr. Shroder. Dr. Shroder, that my not being able to use him and his expertise and his testimony about what the railroad knew or should have known and what they did or didn't do, is critical to my lawsuit. It's just as critical as Dr. Olsen's and Dr. Leonard's testimony. And I think I'm horribly prejudiced. These people have the opportunity to depose him. I'll make him available. I don't honestly know the bottom line of all of his testimony. Mr. Beckwith's been referring to his reports very favorably to their side all day long.

THE COURT: Well, you have your record, Mr. Young. I understand your position. And I'm telling you, in my view, it's too late. And that even though they give them an opportunity to depose next week, then they've got to get experts, they've got to get somebody, if they want to counter it, so that you don't have a reasonable opportunity to prepare your case, either side. It seems to me that this is something that ought to have been done a long time ago.

MR. YOUNG: Very well, your Honor. May I do this, may we mark some exhibits for purposes of the record on this matter? I'd like to mark Mr. Olson's letter to me of July 8th telling me that we agree to file those.

THE COURT: You can make your record.

I want you to have your record. I'm not trying to foreclose that in any way. But I here have to make a decision. And I want the case to go to trial.

MR. YOUNG: So do I, now.

THE COURT: I don't want either side to be prejudiced. But I don't know if I can pull your irons out of the fire for something that you should have done a long time ago, Mr. Young. And for that reason, I would, otherwise, I would not a thing, not even let you talk about these depositions. But I do see some legitimate reason to permit you to go into those. But I do think they are entitled to know what it is that you may want to try to introduce on your case in chief. I'm not foreclosing the possibility of using them, if they are available, for that purpose or by way of impeachment.

MR. YOUNG: Your Honor --

THE COURT: Rebuttal. That maybe you don't have to designate things for that.

MR. YOUNG: I assume therefore that the rule is the same for Mr. Olson and that anybody that he hasn't listed by July the 14th wouldn't be allowed to testify, as well?

THE COURT: That's my ruling.

MR. YOUNG: Thank you.

THE COURT: Whatever you've got, he should

of, let me know, and put them in --

MR. YOUNG: May I mark the July 12th letter as Exhibit 1 to this hearing, your Honor.

Also, I'd call the Court's attention to the previous pre-trial orders which indicate that any other additional witness will be listed ten days before trial. That was the Court's previous pre-trial order.

MR. OLSON: There's never been a pre-trial order.

MR. YOUNG: Well, that was the one you proposed.

MR. OLSON: But the Court's never signed a pre-trial order.

THE COURT: I've never signed any such order, Mr. Young.

MR. YOUNG: Okay. May the record show that the one that Mr. Olson proposed to me in the letter dated June 2, 1989 indicated that in the event other witnesses are to be called at trial, statement and -- general subject matter of this testimony will be served upon opposing counsel, filed with the Court at least ten days prior to trial?

THE COURT: That may very well be. But I'm not aware that I signed any such order. And apparently [illegible] you received was not

accepted by you. So I don't want to foreclose you from making your record, each of you. You are entitled to do that.

MR. YOUNG: that's my record. And the gentleman that I most care about is Mr. Shroder. Mr. Hinsie was going to be a fact witness, and I can introduce his reports through others.

THE COURT: I understand your problem, Mr. Young.

MR. YOUNG: Okay.

THE COURT: You understand my position.

MR. YOUNG: Yes.

THE COURT: All right.

MR. YOUNG: What other matter have we got?

MR. YOUNG: May I make a motion on my motion to compel?

THE COURT: Are you prepared to discuss that? What are you fussing about?

MR. YOUNG: Your Honor, when we took the deposition of Mr. Larry Hansen, he, who is an expert on their behalf, he apparently is going to testify about the results of some analysis he has run on the Thistle slide through computers. One of the most important things in terms of preparing a cross-examination about that is the reason-

ableness of the imput and the reasonableness of the output and the reports of the output. I asked Mr. Hansen at the time of his deposition how much of that would, how much paper that would entail. And he held his hands like that and said thousands of pages or many, many pages. (indicating)

The next day at the deposition of Dr. Olsen, Dr. Olsen advised me that the input and the output numbers would be very limited. And Mr. Hansen was there as well, and agreed that it wouldn't be a lot of paperwork. I requested at that time for purposes of cross examination that those input and output documents of Mr. Hansen's, I made a record on it in the deposition, be provided to me, or that it would be my position that Mr. Hansen couldn't testify to his opinion in this case, because I have no opportunity to cross examine and prepare a cross examination.

I have since talked to Mr. Olson about it, Monday and yesterday. I faxed him a letter last night about it, and I faxed him a motion to compel about it, and request again those documents, and request that they be made available to me immediately, so that my experts can study them, or that Mr. Hansen not be allowed to testify in this case about the results of those documents. Was because we have no way of cross examining him. The defendants submit that, your Honor, that these take days and days to run and that they create thousands of pages in documents in between. But I don't have

the money to do all of that. But my people have, say -- we can see the input and output, we can kind of come to conclusion whether everything in between is reasonable. And Mr. Richman has told me he would not give me. And I would move that he be required to give them to me.

One other thing, your Honor. This is to bring to the Court's attention, so it's on the record. I asked to see the photographs of Mr. Ozment. And I have requested a deposition, notice of deposition of Mr. Hilts. The purpose of the deposition of Hilts is that in his deposition he told, excuse me, in a, in a curriculum vitae that I was provided, he was, he himself has done some reports, among other things, on slope stability for railroads, for the Northern Pacific Railroad. I noticed the deposition of Mr. Hilts for next Monday, to have that record available. It was just a documents session so that I could see that report and a couple of other records that he's done.

Mr. Olson advised me on these two matters. No. 1, on the photographs, they don't intend to use any of Ozment's photographs, and therefore they are not going to bring them and they are not going to make them available to see. And, no. 2, all I asked them to do is bring them all to trial, or "bring your Thistle photographs to trial, Mr. Ozment." He tells me he wouln't do that. No. 2, he tell me that he's not going to be at the deposition. And Mr. Hilts is now a

fact only, he's not an expert witness; and, that he will not be there Monday. And I want to advise the Court of that; that I think that I'll be prejudiced by that, if I'm not entitled to see Mr. Hilts' writings on slope stability and railroads and things like that which I think are extremely relevant to this case.

THE COURT: Mr. Richman?

MR. RICHMAN: Yes. We might bifurcate this, your Honor, with respect to these things that I've declined. Mr. Young as per usualhas got it a little bit wrong. What he really has asked to see is what's called the "limited equilibrium analysis," that's run on the computer program. The Court may or may not recall, Blaine Leonard did what was called a "finite limit analysis." One of the ways we have of checking the validity of the finite limit analysis is to run what's generally thought of as generally accepted scientific tests in the geophysical world, and that is running a limited equilibrum analysis, and which in nature has been run by Mr. Hansen and his office on their computer program.

Now, generally, I would have no difficulty whatsoever, turning that analysis over. This one, by the way, is up to here. (indicating) That would be the point. The limited equilibrium analysis is much smaller. But here's the problem I had. I think we've proven ...

think we've pretty much persuaded or satisfied Mr. Young that the finite element analysis is --

MR. YOUNG: Please don't represent what you've convinced me of, Mr. Richman.

MR. RICHMAN: I kept quiet, Mr. Young, for change while you were talking. I really did.

THE COURT: Let me hear you.

MR. RICHMAN: Okay. What we wanted to do is, the tests, finite element analysis with the limited equilibrium, and be able to see if we get the same answers with respect to the factor of safety. And we did that, and we got totally different answers. Which to our mind convinces us that the finite element analysis is no good. Their expert, Dr. Olsen, testified in deposition the other day. I might state that when this deposition was taken, about a year ago, he said he was going to do a limited equilibrium analysis on this slide so that he could verify the work, the finite element analysis. We took his deposition again basically for the purpose of finding out what he did in terms of his limited equilibrium analysis. And what we got is a scenario that Mr. Young doesn't have any money so hasn't paid or hasn't authorized for the payment of Dr. Olsen to do it, but Dr. Olsen may do a limited equilibrium analysis, he just doesn't know yet.

So where we are is, we've got a limited equilibrium

analysis, and we do have some back up papers that are certainly available and, under normal circumstances, judge, I would give. However, we got Dr. Olson and Mr. Young saying they don't know if they are even going to do one; and if they do one pursuant to an agreement with me, they said they'd give it to us two to three days before trial; but they can't even tell us whether, if they are going to do one. And it seems to me it's patently unfair that we should have to turn over our work product with respect to a limited equilibrium analysis and then have Dr. Olsen go out and do one under those circumstances. I mean, we are put in a terrible bind, being able to have Dr. Olsen shoot at our work, and we've no possibleway of shtting at something Dr. Olsen may or may not do. I just thought it was patently unfair, the position that they were taking. Especially when we brought Dr. Olson back just for the purpose of telling us what his limited equilibrium analysis was going to be as important and he hadn't even done it yet. So I felt kind of put out by it.

And I just think what I would be more than willing to do is, if they tell me they are not going to do a limited equilibrium analysis, I'm more than happy to turn it over to them. If they tell me they are going to do a limited equilibrium analysis, I'm willing to -- them at the same time give them ours when they give us theirs. I think that's fair

But I don't think that we should be turning our stuff over to them without having some assurance from that that they are either going to do it or not going to do it. And that's the problem I had with it, your Honor.

I would defer to Mr. Olson on some of these other things.

MR. OLSON: Real quickly, your Honor, on Hilts and Ozment.

On David Hilts, David Hilts is the geotechnical engineer who advised, he was on the slide when the slide happened, he is a fact witness, he knows the facts in that case. We have never called him as an expert. We have never told Mr. Young we were going to. In fact have made clear to Mr. Kester of Mr. Young's office that he was not going to be an expert in this case.

We are calling him to tell the jury, we'll call him to tell the jury what he saw down there at the slide. He's not -- he lives in Oregon. Mr. Young was aware of those facts, or should have been aware of those facts, had he reviewed the file, and I simply have -- problem. But if Mr. Young, had he noticed the deposition, there is no way this, the court, in process or reaching that individual and the procedures to obtain a subpoena, which can be obtained from the courts of Oregon, which can be from any sister state and subpoena it. And at this point in time, all we're doing

that simply isn't something that we can do. And I don't think it's something we've tried to do, Mr. Hilts not being employed by the railroad and not being our expert.

With respect to Mr. Ozment's photos. It's been a matter of discussion for sometime, and I think it was August 31st, just this Monday, I had indicated to Mr. Young with some anticipation that I would be in Denver, Colorado and that he was welcome to go to Denver and view Mr. Ozment's photos and make determination as to what, if any, of those he would like to have. They are Mr. Ozment's photos. He keeps them in his possession. He's got hundreds of thousands of photos, all over the railroad. It is a hobby of his. And among those photos are some photos of the Thistle area, some of them appeared along the Thistle slide, which is why, I'm sure, Mr. Young is interested. But at present Mr. Ozment has just gone through a divorce, and he boxed all of those up and put them in storage. But after some persuasion, he's agreed, because we didn't want to make things difficult for Mr. Young, instead of having to subpoena it, I agreed with Mr. Young that he could go to Denver on the 31st of August and at that time he could look at any of those photos, and he could choose and make copies of them and he could present them at trial. And I said, "Mr. Young, I'm going to be out of town for a few days, so that when I return I will need to know if you want to go to Denver or not."

I returned to my office last Wednesday and called and asked if Mr. Young made any call. There is nothing, no indication he was going to go to Denver. He left it up in the air. The last time I had seen him, the Friday before my scheduled trip to Denver. And Allen's never suggested to me that he intended to make that trip -- in fact at the most and said "Mr. Ozment, bring all of your Thistle photos over here." That's what discovery is for.

The central fact is that Mr. Young should have gone over and looked at the photos, with the opportunity that he had. He's now asking Mr. Ozment to make some sort of judgment which he'll probably call into question when he does.

MR. YOUNG: I'll withdraw the request to have Mr. Ozment bring the photos. I'll just talk about it with him when he's a witness.

THE COURT: Well, that takes care of it.

MR. OLSON: And on Mr. Hinsie, would that depositions of, depositions could bind non-parties, but they don't. And inasmuch as if he's a non-party, and Mr. Young can't contend otherwise, and inasmuch as we have never help him out to be an expert in that case, he is and always has been a fact witness. He was deposed in 1986 when this case was first filed, and three years have gone by, and now we hear about the need to depose him again. And I say, fine, that he can subpoena him. All I can say is, that he shouldn't

be entitled to simply notice his deposition on the railroad. And, you know, we may or may not be able to get Mr. Hilts available. I can't even tell you what would happen. And I'm not sure that what he's asking for is all that important, anyway.

THE COURT: Well, I guess that's for Mr. Young to decide.

MR. YOUNG: Your Honor, may I just speak to that?

THE COURT: Yes.

MR. YOUNG: Well, both of those issues, I withdraw my request for Mr. Ozment's photos.

With regard to Mr. Hilts, your Honor, and I don't have the record here, but I noticed Mr. Hilts before for a deposition, and I think that notice went to the railroad, and I think they provided him to me in 1986 or 1987, and he was their expert at that time, and he was provided by them. I didn't serve them in Oregon or anything else. He was their retained expert and on Thistle. They brought him down here. They looked at the side. He was the guy who was making the decision.

THE COURT: If they are not going to call him as an expert witness, then I'll hold them to it. But just a fact witness then you can subpoena under the rules the proper way. I don't know that you can get it by getting at

that.

MR. YOUNG: Okay.

THE COURT: But the record should show that they designated that he is not an expert, and is a fact witness, and at the time of trial his testimony as an expert, be it proffered, will not be received.

So, what's the other one?

MR. YOUNG: The other one was the finite element analysis, of the equilibrium analysis, that we had requested of the defendants.

THE COURT: Seems to me on that, Mr. Young, that Mr. Richman's proposal is a reasonable one. If you are not going to have Mr. Olson testify or prepare one, then he'll give it to you. If he is going to prepare one, then you give them, you exchange his with their's.

MR. YOUNG: May I speak to that?

THE COURT: Yes.

MR. YOUNG: I didn't know that the money issue became quite as open at the deposition as all that. But it, Mr. Olson's desire is to see theirs, and if he agrees with it, there would be no reason for him to do one. If he doesn't agree with it, then I would have to pay him a lot of money to do one. I don't have a lot of money. My clients don't have a lot of money. If Mr. Olson believes that there is one reasonably we don't intend to do one; that is, all

we intend is to look at theirs, and if we think the equilibrium analysis they've done is reasonable, we are not going to do one. On ther other hand, and their's has been prepared, I haven't gone to the expense of having him do that, if he believes that there's something strange about their report, then he would like to do one. But he won't know until he sees theirs.

THE COURT: But the problem with it, Mr. Your, is you are up to the time before trial, then if he makes one, then they've got to have time to look at it. I think that this is something, again, that should have been addressed a long time ago. And my feeling on that matter is that if you designate and say that you are not going to have Mr. Olson present such an analysis, then I'll give you a copy of theirs. But if he does propose to do that, then you exchange them.

MR. YOUNG: Okay, your Honor. May we have a date certain upon which they'll, within 24 hours of the time I advise them? Mr. Olson told me their Mr. Hansen was in town yesterday or today, and it must be here, so if I advise them like today, this afternoon, after talking to Dr. Olsen, can I get it tomorrow?

MR. RICHMAN: Yes, I would think I could certainly have it within 48 hours, once I'm told their Mr. Olson is not going to do a limit equilibrium analysis, I can

have it, clearly within 48 hours, and hand-deliver it to Mr. Young.

THE COURT: Yes. That's will be part of the Order.

Have you been writing all of this down, Mr. Olson? I'm going to have you make an order, get something in writing, so that we can all refer to it.

MR. OLSON: I'll try my best, your Honor.

THE COURT: What else have we got?

MR. OLSON: One thing that would be helpful, your Honor, that was brought to our attention yesterday, in talking to our expert: We would like to have our expert present and Mr. Hansen when Mr. Young's experts testify at trial. Mr. Hansen brought to our attention that he is under something of a work crunch because of some pending disasters up in British Columbia. It would be helpful if Mr. Young could indicate when he would intend to call Mr. Olsen -- and Mr. Hansen, so we could bring -- it would not otherwise be necessary to attend the rest of the trial, except for his own testimony. But we would want him here for Mr. Leonard and Mr. Olsen. So that will be helpful to us.

MR. YOUNG: I will try to accommodate that, your Honor. I don't believe in trying cases in the dark. Mr. Olson has represented to me that Mr. Ozment will be available through the trial. I intend to call him.

THE COURT: And then I understand that you will notify them? When will you know that you are going to anticipate calling Mr. is it Mr. Olsen?

MR. YOUNG: Dr. Olsen, your Honor, and Mr. Leonard. I believe, I'll tell the Court right now, I believe I have Mr. Leonard scheduled Tuesday and Wednesday, and Dr. Olsen Thursday and Friday. I had anticipated hopefully that Mr. Shroder would be called Thursday, Dr. Olsen would be called Friday. Mr. Shroder can't testify. Then Dr. Olsen will probably testify Thursday, if the course of the trial is going such that we are ready for him. And I intend to call Mr. Leonard Tuesday or Wednesday. The first week and the first couple of days.

MR. RICHMAN: Appreciate that, Mr. Young.

Just in terms of some time on this, your Honor, we have and we are putting together right now a number of motions in limine on evidentiary matters. We would like to get them filed and scheduled to be heard, so that Mr. Young has some time to respond to them, be heard the morning of trial, before we pick the jury. Would that be an acceptable mechanism for the Court?

THE COURT: Well, my scheduling order is proposed to avoid all of these last minute motions. What are you talking about?

MR. RICHMAN: Well, one of them is

reference to insurance.

One of them is reference to the Utah Railway lawsuit and the outcome of the Utah Railway lawsuit. We have no objection to when he reads the deposition from the Utah Railway case, that on such and such a day this deposition was taken in the following phase. But in terms of talking about what the Utah Railway case was about or the outcome of the Utah Railway case, I think that is irrelevant to this particular case, because it's far more an issue in that case than simply one of a counterclaim.

There were a bunch of others.

MR. OLSON: There are a number of questions, like state of mind, evidence of state of mind. I would have to go back and look.

Mr. Young has indicated he wants to read the D&RGW's 1983 corporate reports and indicates the tax benefits were taken because of this, this disaster. Well, we would object to that as being irrelevant and prejudicial. And all of that will be brief. We've got it prepared, and prepared to file it. We wanted to see his exhibit list first to be sure we weren't being prejudiced just in requesting the Court that include that he wasn't an intender.

MR. RICHMAN: They want all of our insurance policies into evidence. And just a brief overview. It seems that the question in this case is to be

judged by the objective standard of reasonable man's standard. The standard is not what was the railroad thinking when it took it, this action, or didn't take this action. The only thing we look at is what actions was taken, what action wasn't taken, and was that reasonable. Not what's in the mind of the railroad as to whether or not their business -- insurance will pay for any disaster or whether they will get tax benefits as a result of having the mountain fall down on them, the top of the Town of Thistle. That's the kind of thing we don't think should come into evidence. When we got the exhibit list, we saw this really clear, even though they didn't reach it as a pleading.

THE COURT: When can you file your motion?

MR. RICHMAN: We'll have them filed.

THE COURT: All right. Then you can, I want you to respond to them by next Thursday, Mr. Young, if you've got anything you want to put in writing in response to them.

MR. YOUNG: Oh, I'm sure I will.

THE COURT: But in any event then, it looks to me like there's no point in calling a jury much before 1:00 o'clock on Monday. And my determination at this point is that, as far as preemptories are concerned, there will be three on the railroad have three, and the

plaintiff have three. We have asked 50 jurors to come. Do you think that's adequate?

MR. OLSON: I'd say so, your Honor.

MR. YOUNG: With three preempts, your Honor, I think probably so.

THE COURT: All right, what else?

MR. OLSON: There are really two housekeeping matters that we might make you aware of now.

We are going to make a motion to ask the Court to permit, under Rule 47(j), I believe it is, of the Rules of Civil Procedure, permit the jury to visit the site of the slide at some point during the course of the trial. And I don't know, Allen's never really indicated to he he has any objection to that. I don't know. He's fought all the way through, so I wouldn't represent he's said it's okay. But it seems to me as though that would be an appropriate thing, given that's the site of the event, so long at hand. And it's just a crucial thing in the jury's domination.

Second item, also sort of housekeeping. We gave this (indicating) to Allen today. And I know he hasn't had a chance to review it. We've, we prepared through the color photo copying process a small book of photographs that we anticipate being referenced in the course of the trial, and we have organized them into books that might be submitted to each juror. So to the extent that we want them to look at

what is done and want to have a look at evidence, and photographic evidence, they could look at those, basically, jury books, that's all we intend to include. And we've given a copy to Mr. Young today. We would anticipate that this will help them understand this better. It's an awfully difficult question, as we've all learned in taking depositions and having discussions with people, and we want to make it easy as possible for the jury.

Both of these steps we think would assist them.

THE COURT: You'd better put in a motion and let him address it.

MR. YOUNG: Absolutely. On visiting the site, I haven't decided. I'll talk with Mr. Olson about it. Let me think about that one.

With regard to the photographs, that may be highly prejudicial and highly tainted their way. I might note that Mr. Ozment, who took photographs of the scene for years, doesn't happen to have any in there. And I'll have huge objections to that book.

THE COURT: Well, make your motion as part of your motion, and I'll expect you to be here on the morning of the 14th. I won't call the jury to come in until 1:00 o'clock.

MR. RICHMAN: If you don't kick us out soon, your Honor, we'll think of other things to talk about.

THE COURT: Well, I want you to have your record, men. I would hope we could get it so that it's understandable when it goes upstairs.

MR. OLSON: Fine. I just want to let you know we are making those motions. I just thought the Court would be interested to know just where we were headed. Thank you, your Honor.

THE COURT: I want you to prepare an order with respect to what we've done today, Mr. Olson.

MR. OLSON: I will, your Honor.

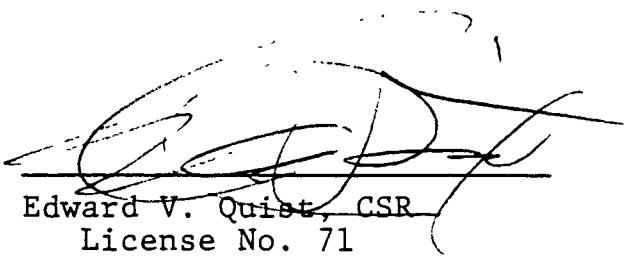
(WHEREUPON, the Court stood in recess at 1:02 o'clock p.m.)

- - -

REPORTER'S CERTIFICATE

I, EDWARD V. QUIST, hereby certify that I am an official court reporter for the above-entitled Court, duly registered and licensed to practice in the State of Utah; that on the 3rd day of August, 1989, I appeared before the above-named Court and reported the proceedings had in the above-entitled cause of action; that the foregoing pages, numbered from 1 to 50, inclusive, contain a true and accurate transcript of my stenographic notes, as taken in the above-entitled hearing, to the best of my ability.

Dated at Provo, Utah this 15th day of May 1990.



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51 South University
Provo, Utah 84601

Tab 5

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Attorneys for Defendant The Denver and
Rio Grande Western Railroad Company

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

ROBERT BERRETT, et al., Plaintiffs, vs. THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, INC. Defendant.	DEFENDANT'S MOTION TO STRIKE PROPOSED WITNESSES AND DEPOSITION TESTIMONY Civil NO. CV86-616 Judge Cullen Y. Christensen

The Defendant The Denver & Rio Grande Western Railroad Company (the "Railroad"), through counsel, moves the Court to strike the names of certain individuals proposed by the plaintiffs as witnesses in this action or whose depositions the plaintiffs propose to read at trial. As grounds for this motion, the Railroad states that, on August 1, 1989, the plaintiffs' counsel for the first time advised the Railroad's counsel of the identity of five non-party witnesses that may be called at trial. In addition, the plaintiffs' counsel

identified for the first time the depositions of seventy-three people deposed in the Utah Railway litigation that might be read at trial. This belated identification of new witnesses and the last minute, ambiguous designation of dozens of depositions is a severe imposition on counsel. Only eleven days remain until trial. The plaintiffs propose nothing short of an ambush and their proposed use of eighty new witnesses whether live or by deposition should be rejected.

DATED this 2d day of August, 1989.

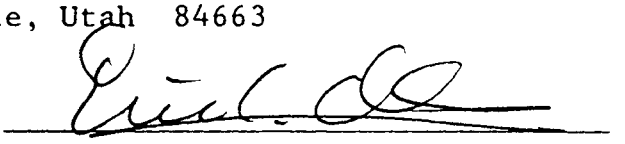
VAN COTT, BAGLEY, CORNWALL & McCARTHY
Michael F. Richman
Eric C. Olson

By _____
Attorneys for Defendant
50 South Main, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone (801) 532-3333

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the within and foregoing DEFENDANTS' MOTION TO STRIKE PROPOSED WITNESSES AND DEPOSITION TESTIMONY to be hand-delivered this 2d day of August, 1989, to the following:

Allen K. Young
Randy S. Kester
Young & Kester
101 East 200 South
Springville, Utah 84663



76620(14)

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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

ROBERT BERRETT, et al., Plaintiffs, vs. THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, INC. Defendant.	MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE PROPOSED WITNESSES AND DEPOSITION TESTIMONY Civil NO. CV86-616 Judge Cullen Y. Christensen

The defendant The Denver & Rio Grande Western Railroad Company (the "Railroad"), through counsel, submits this memorandum in support of the Railroad's Motion to Strike Proposed Witnesses and Deposition Testimony.

ARGUMENT

1. New Witnesses

On August 1, 1989, the plaintiffs' counsel advised the Railroad's counsel for the first time that it might call J. F. Shroder, L. F. Hintze, Ames Archuleta, Mark Archuleta and Fred

Vincent as witnesses at trial. For the forty months prior to August 1, 1989 that this litigation has been pending, the plaintiffs never once made mention of any of these individuals. Now, with only twelve days remaining until trial, the plaintiffs suddenly drop these new names on the Railroad. There is no excuse for this delay. It is now too late to conduct meaningful discovery of these witnesses. The delay in naming them is entirely the plaintiffs' fault. The plaintiffs should be precluded from calling these new witnesses.

2. Seventy-Three Depositions

On August 1, 1989, the plaintiffs also provided the Railroad with a list of depositions from the Utah Railway litigation that the plaintiffs might read at trial. This list includes seventy-three names: John Gaskell, Horst Eublacker, William Holtman, Ed Waring, Hubert Meek, Orlando Miera, DuWayne Gilson, Gale Aydellott, Jack Coppersmith, Charles Colborg, Robert Griffin, James Slosson, Thomas Foley, Francis Lewis, Arthur Manley, Larry Listello, Melvin Brdar, Stephen Dietz, David Hilts, Phyllis Katz, Roland Haacke, Mary Beth Grix, Marjorie Giuntini, Raymond Dettore, Donald Davis, Owen Keith Curtis, James Ozment, Alan Bell, John Cole, John Ambrosia, William Callor, Sr., William Callor, Jr., John Baughman, Amos Archuleta, James Bussio, Robert Hatch, Virginia McDermott, Robert Ourada, Bob Nance, E. Peter Mathies, Raymond Trabulsi,

James McBride, Richard Vassallo, Darrell Giles, Richard Wiegardt, Arthur Manley, John West II, Delmar Yoakum, Frank Stuart, Walter Steckman, Gerard Shuirman, Barry Seaton, James Newcomb, Samual Munderar, Donald Miller, Richard Van Horn, David J. Varnes, Charles Joseph Burroughs, Michael B. Davis, Jimmie Myers, Renee Mottram, Vern Jeffers, Jerry Pearson, Scott Carey, Ronald Packard, Colin Rupel, Larry Parsons, James Pickard, R. Todd Neilson, Robert Pace, Harold Ross, Steven Posner and Victor Posner.

The plaintiffs make no attempt to delineate which depositions or portions of depositions they intend to read. The depositions designated include thousands of transcribed pages with volumes of exhibits. Such a belated, universal designation is entirely improper. At this late date, the Railroad is deprived of any meaningful opportunity to prepare for this testimony by (a) securing attendance of witnesses, (b) deposing designated witnesses or (c) reviewing in advance the proposed testimony. The plaintiffs would be poised to use any fraction of the voluminous proposed testimony leaving the Railroad with no meaningful means of preparation. The plaintiffs' designation should be stricken as nothing short of ambush.

3. Scheduling Deadlines

On October 7, 1988, prior to the February 21, 1989 trial date, the Court entered a Scheduling Order. (A copy of

the Order is attached hereto.) Under the Order, the Court required the exchange of witness lists no later than 98 days before trial. On May 12, 1989, the Railroad's counsel forwarded to the plaintiffs' counsel a proposed Scheduling Order containing similar deadlines for the August 14, 1989 trial date with the exception that the date for exchange of witness lists was set at for seventy days before trial. (A copy of this proposal and the accompanying letter is attached hereto.) The plaintiffs' counsel refused to stipulate to the entry of the proposed Scheduling Order or to commit in writing to any deadlines. Thus, no Scheduling Order was ever entered. Nevertheless, the plaintiffs were fully aware of the time limits deemed appropriate by the Court and those deemed necessary by the Railroad. In the face of such deadlines and proposals, there is no excuse for their eleventh hour wholesale naming of entirely new witnesses.

DATED this 2d day of August, 1989.

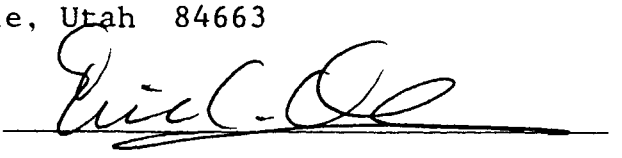
VAN COTT, BAGLEY, CORNWALL & McCARTHY
Michael F. Richman
Eric C. Olson

By _____
Attorneys for Defendant
50 South Main, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone (801) 532-3333

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the within and foregoing MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE PROPOSED WITNESSES AND DEPOSITION TESTIMONY to be hand-delivered this 2d day of August, 1989, to the following:

Allen K. Young
Randy S. Kester
Young & Kester
101 East 200 South
Springville, Utah 84663



76620(4)

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

****

ROBERT BERRETT et al,) Case Number: CV-86-616

Plaintiffs,)

vs.) SCHEDULING ORDER

UT. DEPT. OF PUBLIC SAFETY et al,)

Defendants.)

****

APPEARANCES:

Plaintiff(s) Allen K. Young, Esq.

Ranyd Kester, Esq.

Defendant(s) Eric Olsen

SETTLEMENT CHANCES: Excellent _____; Good _____; Fair XXXXX;

EXPERT WITNESSES TO BE SUBPOENED WITHIN 60 DAYS OF DATE.

DEADLINE FOR AMENDMENTS: Closed

DISCOVERY COMPLETE DATE: December 23, 1988

EXCHANGE WITNESS LISTS: November 15, 1988

MOTION CUT-OFF DATE: January 9, 1989

PRE-TRIAL ORDER DATE BY: November 15, 1988

TRIAL BRIEFS BY: February 10, 1989

REQUESTED JURY INSTRUCTIONS BY: February 10, 1989

SPECIAL VOIR DIRE QUESTIONS BY: February 10, 1989

TRIAL: February 21, 1989 at 9:00 a.m.

Anticipated Length: 2weeks

Judge _____; Jury XXXXXX ; Setting Firm

Dated this 7th day of October, 1988.

BY THE COURT:

Cullen Y. Christensen

CULLEN Y. CHRISTENSEN, JUDGE

cc: to counsel

LAW OFFICES OF
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WRITER'S DIRECT DIAL NUMBER

(801) 237-0280

May 12, 1989

Randy S. Kester, Esq.
YOUNG & KESTER
101 East 200 South
Springville, UT 84663

Re: Berrett v. D&RGW Railroad

Dear Randy:

Enclosed is a proposed Scheduling Order for entry by Judge Christensen. Please indicate your agreement to the form and content of the Order and return it to me for filing. Should you have any questions please do not hesitate to call.

I also look forward to scheduling the completion of the depositions of Joseph Olsen and Blaine Leonard. Please advise me promptly of their earliest availability.

Sincerely,

Eric C. Olson

ECO:sw
Enclosure

cc: Michael F. Richman, Esq. (w/enclosure)

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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

ROBERT BERRETT, GERALD ARGYLE, et al., Plaintiffs, vs. DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, INC., Defendant.	SCHEDULING ORDER Civil No. CV-86-616 Judge Cullen Y. Christensen

The parties being in agreement and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED that this matter proceed as follows:

1. Expert witnesses to be subpoenaed within sixty days of the date of this Order.

2. Deadline for amendments: Closed.

3. Discovery completion date: June 29, 1989.

4. Exchange witness lists: June 2, 1989.

5. Motion cut-off date: July 14, 1989.

6. Pretrial Order by: June 19, 1989.

7. Trial briefs by: August 4, 1989.

8. Requested jury instructions by: August 4, 1989.

9. Special voir dire questions by: August 4, 1989.

10. Trial: August 14, 1989 at 9:00 a.m.

11. Anticipated length: Two weeks.

12. Trial by jury: Firm setting.

DATED this ___ day of May, 1989.

_____
Cullen Y. Christensen

Agreed to:

_____
Attorneys for Plaintiffs

75640

Tab 6

Tab 7

C O P Y

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR UTAH COUNTY, STATE OF UTAH

- - -

ROBERT BERRETT, GERALD ARGYLE, et al.,

Plaintiffs,

vs.

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, INC.,

Defendant.

Case No. CV-86-616

TRANSCRIPT OF HEARING OF MOTION FOR NEW TRIAL

BE IT REMEMBERED, that the above-entitled matter came on regularly for hearing before the Honorable Cullen Y. Christensen, Judge of the above-entitled Court, on the 3rd day of January, 1990, at the hour of 3:13 o'clock p.m., at Room 310, County Courthouse, 51 South University, Provo, Utah;

That there appeared as counsel representing plaintiffs, ALLEN K. YOUNG, ESQ. and RANDY S. KESTER, ESQ., and as counsel representing defendant, MICHAEL F. RICHMAN, ESQ. and ERIC C. OLSON, ESQ.

WHEREUPON, the following proceedings were had:

- - -

THE COURT: The matter we have before

a world-reputed geologist and a world-reputed geomorphologist. His interest is in geomorphology. When I was finally able to locate him at home, I told him generally the facts of this case, and he told me: "I warned him years ago that that railroad could cause a landslide in that area. In my article. And just whereas you've told me, Mr. Young, it sounds like they certainly were a cause. I hate to tell you that without more, so would you send me the information that you have."

I, immediately, and this was around the 15th or 16th or 18th of July sent him the depositions of Hiltz and Morgenstern and the written statement of Mr. Ozment. Within two days he called me back and he said: "Mr. Young, I am convinced that the railroad was in fact a cause of that slide. I would be happy to come to Utah. Would you sent me a retainer and I will make plane reservations." We even talked about the days of the week that he could be available for trial. He purchased a plane ticket for, on July the 29th for the 15th of August, leaving on the 17th of August. And the Court probably doesn't remember, but our, but I think the 15th was like Wednesday of the trial week and the 17th, it was like Friday evening. I immediately thereafter listed Dr. Shroder as an expert witness for the plaintiff. Within the ten days in the defendant's proposed pre-trial order and my proposed pre-trial order. The defendant, I guess, knowing that their whole defense was going to be framed around geo-

technical engineers versus geologists and geomorphologists, immediately objected saying "it's too late, you can't list him now, we don't have an opportunity to discover."

We came here, they made a motion in limine, we had argument. I tendered Dr. Shroder for deposition, I told him I would make him available to them for a deposition. There were others involved in that motion, your Honor, a Dr. Hinsie and also a name of Archuletta. By way of commentary, the defendants did in the interim take Archuletta's deposition, did take Dr. Hinsie's deposition.

Throughout the trial it began to ring in my ears, in cross examination and particularly in closing arguments that went on for about an hour, that: "What geomorphological experience do you have, Dr. Olsen? What geological experience do you have, Mr. Leonard?" It went on and on and on, in cross examination and in closing argument. The attack was on the credibility of my witnesses, not having experiences in geomorphology and geology.

I was kept from bringing a world-renowned geomorphologist to rebut or in my case in chief to present evidence of his opinion from a background of geomorphology and geology with regard to the cause of that Thistle slide.

Your Honor, with all due respect, I believe that I lost this trial because the jurors believed that geomorphologists and geologists and their credentials more than my

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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

ROBERT BERRETT, et al., Plaintiffs, vs. THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, INC. Defendant.	ORDER Civil No. CV86-616 Judge Cullen Y. Christensen

On August 3, 1989, appeared before this Court Allen K. Young, counsel for plaintiffs, and Michael F. Richman and Eric C. Olson, counsel for defendant, on the plaintiffs' Motion to Compel and the defendant's Motion to Strike Proposed Witnesses and Deposition Testimony and the Court having reviewed the file herein, having heard the argument of counsel and being otherwise sufficiently advised,

IT IS HEREBY ORDERED that:

1. The parties may not call at trial any witness not listed in the drafts of the proposed pretrial order, ~~or~~

~~otherwise disclosed to the opposing counsel~~ of, on or before July 7, 1989. Specifically, the plaintiffs may not call J. F. Shroder or Fred Vincent as witnesses at trial. The plaintiffs may call Amos Archuleta and Mark Archuleta as witnesses at trial.

2. No later than August 9, 1989, the plaintiffs' counsel shall deliver to the defendant's counsel a list identifying by page and line those portions of each Utah Railway deposition that the plaintiffs propose to read to the jury at trial.

3. The defendant's counsel shall supply to the plaintiffs' counsel the input/output data from Dr. Larry Hansen's computer limit equilibrium analysis of the Thistle slide within forty-eight hours of the time at which (a) the plaintiffs' counsel advises the defendant's counsel that Dr. Joseph Olsen will not perform a limit equilibrium analysis of the Thistle slide or (b) the plaintiffs' counsel provides the defendant's counsel with the input/output data from the limit equilibrium analysis or analyses of the Thistle slide performed by Dr. Joseph Olsen.

4. The plaintiffs' request to require James Ozment to bring all of his photographs of the Thistle slide to trial, which request was resisted by the defendant, is withdrawn.

5. The plaintiffs' request to compel the appearance of David Hilts at a deposition on August 7, 1989 is denied upon the representation of the defendant's counsel that Mr. Hilts will not be an expert witness at the trial but only a fact witness.

6. The parties shall file all remaining pretrial motions no later than August 4, 1989. Any opposing memoranda shall be filed no later than August 10, 1989.

DATED this 15 day of August, 1989.

Cullen Y. Christensen

CULLEN Y. CHRISTENSEN, Judge
Fourth Judicial District

76700

Tab 8

1991 REVISED EDITION

FEDERAL CIVIL JUDICIAL PROCEDURE and RULES

as amended to July 1, 1991

NOTES OF ADVISORY COMMITTEE ON RULES

ıbdivision (f); Sanctions. Original Rule 16 did not tion the sanctions that might be imposed for failing to ply with the rule. However, courts have not hesitat- o enforce it by appropriate measures. See, *e.g., Link Vabash R. Co.*, 370 U.S. 628 (1962) (district court's ıissal under Rule 41(b) after plaintiff's attorney failed ıppear at a pretrial conference upheld); *Admiral atre Corp. v. Douglas Theatre*, 585 F.2d 877 (8th 1978) (district court has discretion to exclude exhibits efuse to permit the testimony of a witness not listed r to trial in contravention of its pretrial order).

o reflect that existing practice, and to obviate depend- e upon Rule 41(b) or the court's inherent power to ılate litigation, *cf. Societe Internationale Pour Par-* s is true under Rule 37(b)(2), the imposition of sanc- ıs may be sought by either the court or a party. In ition, the court has discretion to impose whichever ction it feels is appropriate under the circumstances. action is reviewable under the abuse-of-discretion ndard. See *National Hockey League v. Metropolitan ckey Club, Inc.*, 427 U.S. 639 (1976).

ticipations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958), Rule 16(f) expressly provides for imposing sanctions on disobedient or recalcitrant parties, their attorneys, or both in four types of situations. Rodes, Ripple & Mooney, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* 65–67, 80–84, Federal Judicial Center (1981). Furthermore, explicit reference to sanctions reenforces the rule's intention to encourage forceful judicial management.

Rule 16(f) incorporates portions of Rule 37(b)(2), which prescribes sanctions for failing to make discovery. This should facilitate application of Rule 16(f), since courts and lawyers already are familiar with the Rule 37 standards. Among the sanctions authorized by the new subdivision are: preclusion order, striking a pleading, staying the proceeding, default judgment, contempt, and charging a party, his attorney, or both with the expenses, including attorney's fees, caused by noncompliance. The contempt sanction, however, is only available for a violation of a court order. The references in Rule 16(f) are not exhaustive.